Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

CITY OF OMAHA,

Petitioner,

v.

ROYCE DOANE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

As the result of a conflict among the circuits of whether or not to include the effects of mitigating factors when determining if a person with a vision impairment is disabled within the purview of the Americans with Disabilities Act, a policeman, who is blind in his left eye and has some diminished vision in his right eye, has been sent onto the streets of Omaha, Nebraska, to engage in high speed pursuits, crowd control, exchange of gunfire and forceful arrests. The only evidence of his qualifications being that ten years before trial, he had been a policeman for several years with the same vision impairment. It is imperative that this Court provide guidance that will allow for uniform interpretation of the American with Disabilities Act by addressing the following questions:

1. In determining whether a person is protected by the Americans With Disabilities Act (hereinafter sometimes referred to as the "ADA"), is it appropriate to consider "mitigating measures" when considering whether an impairment substantially impacts the major life activity of seeing; if so, is it appropriate to deem the internal, involuntary, subconscious adjustments made by the brain, which enables the person to see as well as the average citizen, as a mitigating measure?

2. In determining whether a person who is blind in one eye suffers from an impairment that substantially interferes with his or her ability to perform major life activities, and thus is protected by the ADA, is the person's testimony and medical testimony that the disability has not substantially interfered with his or her ability to perform major life activities more probative than the

QUESTIONS PRESENTED FOR REVIEW

medical testimony establishing the percentage of disability to the body as a whole?

3. In Title I cases, when a position's essential job functions necessarily implicate the safety of others, must the plaintiff prove that he or she can perform those functions in a way that does not endanger others in order to establish that he or she is "qualified" for a job within the meaning of the Americans with Disabilities Act?

4. Can a person rely solely on evidence of past performance to prove he can perform an essential function in the future without posing a direct threat to third persons, when the position's essential job functions necessarily implicate the safety of others?

5. In determining whether a person is qualified to perform the job of a police officer, does his or her failure to meet vision standards required for public safety based on solid scientific studies require a finding that he or she is not qualified?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of this case in this court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

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OPINIONS BELOW

The June 16, 1997 opinion of the Court of Appeals affirming the Nebraska District Court's judgment, whose judgment is herein sought to be reviewed is reported at 115 F.3d 624 (8th Cir. 1997) and is reprinted in the Appendix to this Petition, App. 1. The nonpublished opinions of the United States District Court for the District of Nebraska are reprinted in the Appendix as follows: The Order entered February 5, 1995, denying the Defendant's Motion for Judgment as a matter of law and Motion for New Trial, awarding plaintiff backpay and prejudgment interest and setting an evidentiary hearing on the issues of "current physical fitness, front pay, and reinstatement on February 26, 1996 is reprinted at App. 18; the Order entered on May 1, 1996, is reprinted at App. 31; and, the Order and Final Judgment entered June 21, 1996 is reprinted at App. 41.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on June 16, 1997; and Appellant's suggestion for rehearing in banc and petition for rehearing was denied on July 30, 1997. The jurisdiction of this case is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules Numbers 10(a) and 13.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

This case involved the interpretation of the term "disabled person" within the purview of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq, Regulations, Interpretive Guidelines, and EEOC Compliance Manuals, promulgated thereafter; and in particular 42 U.S.C. § 12102(2), 42 U.S.C. § 12111(8), 42 U.S.C. § 12113(b); E.E.O.C. Title I Regulations and Interpretive Appendix: 29 C.F.R. Part 1630, et seq., and in particular 29 C.F.R. Part 1630.2(g), (h), (i), (j), (l), (m), (n), (q), (r); 29 C.F.R. Part 1630.10; 29 C.F.R. § Part 1630.15(b)(2); EEOC Compliance Manual, Volume 2, EEOC Order 915.002, Section 902, Definition of the Term "Disability."

STATEMENT OF THE CASE

This civil rights job discrimination case was brought pursuant to Title I of the Americans with Disabilities Act of 1990, by then civilian City of Omaha employee Royce Doane, Detention Technician (jailer), who suffers from a vision impairment which renders him blind in his left eye and with a slight vision impairment in his right eye. On August 12, 1992, he sought to return to the position he held ten years prior, as an uniformed police officer with the same impairment until it was discovered. Litigation followed the City's communication to Doane that his vision impairment would pose an unacceptable safety hazard for the position of police officer. The complainant sought restoration of his employment as a sworn, uniformed police officer.

The City of Omaha is a municipal corporation. Chapter 23 of the Omaha Municipal Code, the Police Labor Agreement, and the Standard Operating Procedures govern the City's hiring process, assignments, shift bidding, seniority and discipline issues concerning the Police Department.

The Plaintiff sought employment as a police officer as that position was described in the announcement of examination posted May 11, 1992. The qualifications for an original appointment and reemployment as a police officer are the same. Both require that a candidate pass a written, physical, psychological, hearing and vision examination; and a physical agility examination.

During his eleven years as a police officer, now over 12 years ago, the plaintiff worked primarily alone, was involved in two confrontations, neither physical, and had one pursuit for about two or three blocks.

Not disabled within the purview of the Americans With Disabilities Act.

The evidence presented demonstrated that although Doane suffers an impairment to the body as a whole and to his vision, he has not suffered an impairment that substantially interferes with the major life activity of seeing within the purview of the Americans with Disabilities Act of 1990.

The evidence of Doane's medical experts and rehabilitation expert was that medical standards required them to assess a 24% percent disability to the body as a whole, as result of the loss of Doane's vision in his left

eye; the loss of sight in his left eye did not interfere with Doane's ability to see as well as the general public; Doane's partial blindness did not impair his ability to do the things he did before his impairment; although he could not increase his range of vision, he could compensate for his lack of peripheral vision by turning his head frequently; and, to compensate for the lack of depth perception, he had learned to use other cues to judge distance.

Not perceived to be disabled within the purview of the Americans with Disabilities Act.

The City of Omaha reviewed studies entitled "Recommended Vision Standards for Police Officers (Revised 1985) by Sheedy, Keller, Pitts, Lother, and Miller" and "Police Vision Standards by Sheedy" (1980) prior to responding to Doane's inquiry.

Neither Omaha Police Chief Skinner, nor Personnel Director Marfisi perceive the Plaintiff as unable to work in the law enforcement class of occupations. Chief Skinner approved Doane's appointment to the position of Detention Technician II, a position that books, searches, and sometimes forcibly restrains suspects in police custody.

The police chief considered the risk of harm to Doane, fellow officers and the public would be unreasonable if Doane were a police officer; but the risk of harm to Doane, fellow officers and the public would not be prohibitive if Doane was a detention technician because of the isolation of the work area, the presence of other employees and the absence of the general public.

Not qualified to perform the essential functions of a law enforcement officer.

Since 1984, the last year Doane was a police officer, crime prevention has become more dangerous to officers and the public, as a result of the disrespect for police officers by suspects, bystanders and perpetrators, of the gang family mentality; and of the increase of the number of large caliber weapons and the addition of automatic weapons.

Reaction time is directly related to vision, reflex action, the body reacting before the brain records an image, is important to the safety of police officers in pursuits, forceful arrests, crowd control and firearms defense. Because they were able to perceive a threat from their peripheral vision, police officers were able to prevent death or severe injury from occurring to themselves and their fellow officers.

The Plaintiff did not present any evidence that he was qualified for the position of police officer, except testimony that he was a good police officer eleven years before the trial.

The Plaintiff presented no evidence that the City hired, in his place, a nondisabled person.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Opinion excluding the internal subconscious adjustments a persons's brain makes as mitigating factors is in Conflict with the Fifth, Sixth, Seventh, and Eleventh Circuits and contrary to Federal Regulations and EEOC Interpretive Guidelines.

To include or not to include mitigating factors when interpreting the Americans with Disabilities Act.

The Eighth Circuit's Opinion on the issue of whether or not to include the effects of mitigating measures when determining if a person with a sight impairment is disabled within the purview of the Americans With Disabilities Act is in conflict with the Seventh and Fifth Circuits, but in harmony with the Eleventh and Sixth Circuits.

However, the Eighth Circuit's Opinion including among mitigating factors, the internal, subconscious adjustments a person's brain makes to offset the impact of a vision impairment is in conflict with all of the above circuits, the federal regulations and the Interpretive Guidelines of the Equal Employment Opportunity Commission.

The threshold question presented by 42 U.S.C. 12102(2)(A), whether the person has an impairment that substantially interferes with his or her ability to perform a major life activity, is the pivotal point in maintaining the integrity of the civil rights purpose of the Americans With Disabilities Act.

Under 42 U.S.C. 12102(2)(A) one must first determine if there is an impairment; and second, whether or not the

impairment substantially interferes with the complainant's ability to perform one or more major life activities. It is the second inquiry that causes conflict among the circuits.

Some circuits consider the impairment as it exists after mitigation by prosthetic devices or medication, *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1994); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1997), also see the dissent in *Gilday v. Mecosta County*, ___ F.3d ___ (6th Cir. 1997); other jurisdictions exclude the mitigating factors, *Harris v. H & W Contracting Co.* 102 F.3d 624 (11th Cir. 1996), *Gilday v. Mecosta County*, ___ F.3d ___ (6th Cir. 1997); and, one jurisdiction expands the concept of "mitigating factors" to include the internal, subconscious, mental adjustments a person's brain makes, *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997).

The Eighth Circuit Court of Appeals, confronted with an obvious impairment, loss of vision in one eye, and faced with uncontested testimony from Doane, his experts and the City's experts that no major life activity was impaired, struggled to include Doane within the definition of a disabled person within the purview of 42 U.S.C. 12102(2)(A) of the ADA. It reached beyond even EEOC's interpretive guidelines, and included within mitigating factors, Doane's brain's subconscious adjustments to the impairment.

The Eighth Circuit's holding in *Doane v. City of Omaha*, 115 F.3d 624 (8th Cir. 1997) was a sharp deviation from the civil rights job discrimination employment barrier consideration voiced by the Seventh Circuit in 1995

in *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995), (vision impairment which rendered the plaintiff, a physician, legally blind) that found that Roth's sight impairment was not a barrier and thus he was not a disabled person within the purview of the ADA; and, most recently in the Fifth Circuit in *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1997) which determined that a person who was blind in one eye was not disabled within the purview of the Americans With Disabilities Act.

Assuming it is possible to identify a "deviate" subconscious adjustment, if the internal, subconscious adjustments an individual's brain makes that allows him to overcome the effects of an impairment is excluded from analysis, all that would remain would be a hypothesis of an effect an impairment may have on the person's body, an assumption of disability, not the effect the impairment does have on the complainant's life, a factual civil rights determination.

There can be no argument that expansion of the mitigation concept to include imperceivable, internal, subconscious, mental adjustments eliminates the statutory requirement of a "substantially limiting" impairment and destroys the integrity of the Americans With Disabilities Act as civil rights legislation.

Substantially limited in the major life activity of working.

If under 42 U.S.C. 12102(2)(A) the impairment does not substantially interfere with a claimant's ability to perform a major life activity, a specific inquiry is made as

to whether an individual is substantially limited in the major life activity of working.

The regulations define substantially limited in the major life activity of work as, " . . . significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills and abilities. The inability to perform a single particular job because of an impairment does not constitute a substantial limitation in the major life activity of working. . . . " The acknowledgement by the employer of the existence of the impairment, even the denial of the employment by the employer because of the impairment is not actionable under the Act.

By finding that Doane's impairment rose to the level of an ADA disability, the jury was precluded from considering the effect of Doane's employment as a Detention Technician and the City's comparison of the risks involved with that position weighed against the risks involved if he were to be a police officer.

II. The Eighth Circuit's Opinion, is in conflict with the First Circuit on the issue of qualified to perform essential functions, when essential functions include performance in a way that does not endanger others and on the issue of when an employee is regarded as disabled within the purview of the Americans with Disabilities Act.

Qualified Person With a Disability.

The First Circuit would require the plaintiff to prove that he can perform the essential functions of a police

officer in a way that does not endanger other persons, in order to establish that he is "qualified" within the purview of Title I of the Americans with Disabilities Act. *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997).

In *Doane, supra,* it is apparent that the Court did not require the plaintiff to prove that he could perform the job of police officer in a manner that would not endanger others in order to prove he was qualified.

In *Doane,* the only evidence offered on vision and safety was the defendant's expert, who testified that the safe performance of the essential functions requires the use of peripheral vision to protect the officer, his fellow officers and the public from unanticipated attacks; defendants's exhibits 103 and 104, treatises on law enforcement and vision, which had been reviewed by City representatives and used as a basis to determine that the Plaintiff would present an unreasonable danger to the safety of himself, his fellow officers and the public; and, the testimony of law enforcement trainers that in the event of injury to one eye during a confrontation, the second eye acts as a back up to prevent total blindness and thus lessen vulnerability during the confrontation. Doane's medical experts admitted that adjustment did not increase the field of vision.

The Eighth Circuit, joins with its sister circuits in holding that evidence of past performance is not competent evidence of the ability of a person to perform without endangering others in the future. *Smith v. City of Des Moines, Iowa,* 99 F.3d 1466 (8th Cir. 1996). Yet, in the face of uncontested testimony from police officers that law enforcement was presently more dangerous, than in the

past, the Court accepted the Plaintiff's evidence of his past performance and did not require the plaintiff to prove that he could perform safely in the future.

Perceived to be Disabled

The First Circuit would also require the plaintiff to prove more than just the employer's knowledge of his impairment, in order to prove the employer regarded Doane as disabled, it would require Doane prove that the employer's act was motivated by discriminatory intent, animus or pretext.

The Court disallowed the jury instruction sought by the City, that denial of a single position within a class of positions was not evidence that an employer perceived a person to be substantially limited in a major life activity. The jury was left without any other factors to consider, except the employer's knowledge of the impairment. A position it would not have been faced with if the Court had indeed correctly found that Doane's inability to see with his left eye was not a substantial limitation of his ability to see when compared to the average person.

CONCLUSION

The Americans With Disabilities Act is the first civil rights employment legislation that seeks to protect an amorphous class, a class that is identified only by the effect the impairment has on a claimant's life, which effect is, in turn, to some extent, governed by each complainant's own initiative.

The Act has been in effect since July 26, 1992; and yet, five years later the lower courts continue to struggle to distinguish between disability legislation, which identifies the physical effects of an impairment and seeks to compensate a person therefor; and, civil rights legislation which seeks to remove barriers, when they exist, from the employment paths of a protected class of people.

The difficulty experienced by the courts in determining if a civil rights violation has occurred under Title I of the ADA is exacerbated when faced with a complainant that suffers from an apparent impairment such as the loss of a limb, or loss of an eye. It simply flies in the face of common sense to adopt any view point other than "the loss of something results in a deficiency of performance of the act the thing does." That belief borne of common sense is so strong, that courts create legal fictions and fact finders are tempted to, and sometimes do, discount the testimony of experts, and even the claimant, when the testimony demonstrates that the impairment does not substantially interfere with the claimant's ability to perform a major life activity. As a result, persons who suffer from impairments that have not substantially affected their lives, and therefore as a matter of law are not members of the class the civil rights legislation seeks to protect, are included as part of the protected class. By doing so we perpetuate the stereotypical, caretaker mindset, that is so offensive to members of a protected class and that the civil rights legislation seeks to erase.

This case demonstrates more than any other why this Court must guide the lower courts toward a uniform interpretation of the Americans with Disabilities Act.

WHEREFORE, Petitioner respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

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The U.S.D.C. Nebraska Order entered February 5, 1995, denying the Defendant's Motion for Judgment as a matter of law and Motion for New Trial, awarding plaintiff back pay and prejudgment interest and setting an evidentiary hearing on the issues of current physical fitness, front pay, and reinstatement on February 26, 1996 ..... App. 18

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APPENDIX

Royce DOANE, Plaintiff-Appellee,

v.

CITY OF OMAHA, Defendant-Appellant.

No. 96-2835.
United States Court of Appeals,
Eighth Circuit.
Submitted Feb. 10, 1997.
Decided June 16, 1997.

Police officer sued city, alleging that refusal to rehire him on account of his blindness in one eye violated Americans with Disabilities Act (ADA). The United States District Court for the District of Nebraska, Thomas Thalken, United States Magistrate Judge, denied city's motion for judgment as a matter of law and entered judgment on jury verdict in favor of officer. The Court of Appeals, Hansen, Circuit Judge, held that: (1) officer was individual with a disability entitled to ADA's protections; (2) whether officer's monocular vision did not prevent him from performing essential functions of his job was for jury; and (3) district court did not abuse its discretion in ordering officer's reinstatement.

Affirmed.

Sherry E. Cotton (argued), Omaha, NE, for Appellant.

Thomas F. Dowd (argued), Omaha, NE, for Appellee.

Before RICHARD S. ARNOLD, Chief Judge, HANSEN, Circuit Judge, and BATTEY,[1] District Judge.

HANSEN, Circuit Judge.

Royce Doane, a former Omaha police officer, brought this suit against the city of Omaha, Nebraska, for discriminating against him on the basis of his disability, in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12100-213 (1994). A jury found in favor of Doane, and the city of Omaha appeals the district court's[2] denial of its motion for judgment as a matter of law. The city also claims error in the district court's refusal to use its requested jury instruction and in the remedies awarded. We affirm.

I.

Royce Doane brought this suit against the city of Omaha, claiming that the city discriminated against him on account of his disability when it failed to rehire him as a police officer. Doane had been a police officer in Omaha from June 30, 1973, until June 2, 1984. Two years into his employment, in 1975, Doane lost vision in one eye due to glaucoma. With glasses, his overall vision is corrected to 20/20, though he actually is seeing out of only one eye. He reported the blindness to his immediate command

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[1] The HONORABLE RICHARD H. BATTEY, Chief Judge, United States District Court for the District of South Dakota, sitting by designation.

[2] The Honorable Thomas D. Thalken, United States Magistrate Judge for the District of Nebraska, presiding over the case by the consent of the parties. 28 U.S.C. § 636(c).

officer and took some medical leave for treatment, but he continued working successfully and competently as a police officer for nine years after the onset of this condition. During those nine years, Doane performed all the duties required of a police officer and consistently attained qualification as an expert in the use of firearms.

In 1984, Doane was asked to undergo an eye examination, after which he was advised that his career was over. Doane was given a choice between resigning with a small pension or applying for a 911 communications job. Doane took the 911 position and later also worked for a time as a jailor. Doane made several requests for reemployment as a police officer, but each was denied on account of his blindness in one eye.

Relevant to this suit, Doane applied for re-employment as an Omaha police officer on August 12, 1992. The job notice to which Doane replied listed vision as a special requirement of the job and stated the following:

> Vision must be not less than 20/200 using both eyes without squinting, correctable to 20/20 using both eyes without squinting. Applicants must also possess normal color perception and have no evidence of irreversible disease which will affect the person's sight.

(Appellant's App. at 64.) The city asserted that the "using both eyes" language meant that an applicant must have binocular vision – the ability to see out of each eye. The city employed police officer recruits other than Doane for its training class, which began on November 30, 1992. On July 23, 1993, the city personnel director denied Doane's request for re-employment. The city rejected Doane's application on the basis of Chief of

Police Skinner's conclusion that Doane's vision problem was a significant limitation. Specifically, Chief Skinner thought that Doane's lack of peripheral vision in one eye would significantly limit his ability to perform as a police officer.

Doane filed a discrimination charge with the Nebraska Equal Opportunity Commission and the United States Equal Employment Opportunity Commission. The Nebraska Equal Opportunity Commission required the city to re-employ Doane, but the city personnel director refused to do so. Consequently, Doane brought this ADA suit, which was tried to a jury. Doane's medical experts testified that binocular vision is not required to satisfy the vision standard set forth in the 1992 job notice and that Doane's visual abilities sufficiently satisfy the requirements of that notice.

The city made an oral motion for judgment as a matter of law at the close of the plaintiff's evidence and renewed its motion at the close of the case. The district court overruled the motions and submitted the case to the jury. The jury returned a verdict in favor of Doane, awarding compensatory damages (including neither back nor front pay) in the amount of $50,000. The district court denied the city's post-trial motion for judgment as a matter of law or a new trial and awarded Doane $40,000.20 in back pay and $10,874.77 in back pension benefits. Additionally, the district court ordered reinstatement by requiring the city to allow Doane to enter police recruit training. The city appeals.

II.

We review de novo the district court's denial of a motion for judgment as a matter of law, using the same standards as applied by the district court. *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1212 (8th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 946, 136 L.Ed.2d 835 (1997). We view all facts and resolve any conflicts in favor of the jury verdict, giving Doane the benefit of all reasonable inferences. *Id.* "It is well settled that we will not reverse a jury's verdict for insufficient evidence unless, after viewing the evidence in the light most favorable to the verdict, we conclude that no reasonable juror could have returned a verdict for the nonmoving party." *Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir.1997) (en banc), *petition for cert. filed*, 65 USLW 3694 (U.S. Apr. 4, 1997) (No. 96-1571).

The ADA generally protects "a qualified individual with a disability" from discrimination on the basis of that disability in matters of job applications and hiring, among other aspects of employment. 42 U.S.C. § 12112(a). To obtain relief under the ADA, a plaintiff must establish that he is (1) a disabled person within the meaning of the ADA, (2) that he is qualified to perform the essential functions of his job either with or without reasonable accommodation, and (3) that he suffered an adverse employment action because of his disability. *See Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir.1995); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir.1995).

A. Disabled within the meaning of the ADA

The city contends that in spite of Doane's blindness in one eye, he is not a disabled person within the meaning of the ADA. The ADA defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," or having "a record of such an impairment," or when an individual is "regarded as having such an impairment." 42 U.S.C. § 12102(2). "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, *seeing*, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (emphasis added). Factors to consider in determining whether a disability has substantially limited a major life activity include "the nature and severity of the impairment," "the duration or expected duration of the impairment," and "the permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2). *See Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir.1996).

The agency's interpretive guidance on the ADA explains that "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." 29 C.F.R. pt. 1630, appendix § 1630.2(j). "[A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity." 29 C.F.R. Pt. 1630, App. § 1630.2(j). Additionally, "[t]he

determination of whether the individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Id. See also Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir.1996) (holding that the ADA interpretive guidelines are based on a permissible construction of the statute); *Sicard v. City of Sioux City*, 950 F.Supp. 1420, 1428-39 (N.D.Iowa 1996) (same).

Doane experiences total permanent blindness in one eye due to glaucoma. *See Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 n. 2 (4th Cir.1997) (noting that "both glaucoma and blindness . . . can be disabilities"). He presented evidence that the loss of vision in one eye constitutes a 25% disability of the visual system and a 24% whole body impairment, according to the American Medical Association. Doane's medical experts testified that Doane's blindness in one eye substantially limits his major life activity of seeing. The evidence demonstrated that Doane cannot sense depth in the same manner as persons with binocular (two-eyed) vision, and his peripheral vision is limited due to his impairment.

The city argues that Doane's impairment does not substantially limit the major life activity of seeing because Doane has learned to adapt and accommodate himself to his impairment. Doane's corrected vision is 20/20. His medical experts testified that his brain has learned to work with environmental clues to develop his own sense of depth perception using only one eye and that he has learned to compensate for his loss of peripheral vision by adjusting his head position. His doctor expressed the opinion that Doane is able to function

normally because his brain has learned over the years to make subconscious adjustments to compensate for the limitation.

We conclude that Doane is an individual with a disability within the meaning of the ADA. His glaucoma caused permanent blindness in one eye which substantially limits Doane's major life activity of seeing. The manner in which Doane must sense depth and use peripheral vision is significantly different from the manner in which an average, binocular person performs the same visual activity. Doane's brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include consideration of mitigating measures. His personal, subconscious adjustments to the impairment do not take him outside of the protective provisions of the ADA.

The city urges us to follow the Fifth Circuit's holding that "a person is not handicapped if his vision can be corrected to 20/200." *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir.1993), *cert. denied*, 511 U.S. 1011, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994). Because Doane's vision is correctable to 20/20, the city argues, he is not a person with a disability within the meaning of the ADA. We decline to apply the Fifth Circuit's holding in this case. We must consider each situation on a case by case basis. Doane's vision impairment stems not merely from overall poor eyesight but from total blindness in one eye due to glaucoma, which significantly restricts the manner in which Doane performs the major life activity of seeing. Thus, Doane is a person with a disability entitled to the ADA's protection.

In this case, even if Doane's glaucoma did not actually substantially limit Doane's ability to see, our conclusion would be the same. The ADA's definition of disability includes persons who are perceived as having an impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2)(C). Police Chief Skinner testified that he perceived Doane's visual problem as a significant limitation and that this was the reason he recommended rejecting Doane's employment application. (Appellee's App. at 18-19.) Thus, the evidence demonstrates that the city perceived Doane as having a disability that substantially limited his ability to see. The city cites cases holding that a plaintiff's major life activity of working is not substantially limited by an inability to perform a single job. *See, e.g., Wooten,* 58 F.3d at 386; *Chandler,* 2 F.3d at 1391-93; *Welsh v. City of Tulsa, Okla.,* 977 F.2d 1415, 1417-19 (10th Cir.1992). We do not disagree with this statement of law. The principle is simply inapposite in this case where the major life activity affected is that of seeing, not working. Likewise, the district court did not err by refusing to give the city's requested jury instruction, which explained that an impairment preventing an individual from meeting the requirements of one particular job does not substantially limit the individual's major life activity of working.

B. Qualified for the position

Next, the city argues that Doane was not qualified to perform the essential functions of the position of a sworn police officer. The city's expert testified that binocular vision and peripheral vision are very important in a law enforcement situation and that a person with monocular

(one-eyed) vision would have a lower reaction time, rendering that person a danger to himself, fellow officers, and the public. All of the medical experts agree that Doane's peripheral vision is limited.

As noted above, a plaintiff bears the burden to demonstrate not only that he is disabled, but also that he is qualified for the job. To be a "*qualified* individual with a disability," 42 U.S.C. § 12112(a) (emphasis added), an individual must satisfy "the requisite skill, experience, education and other job-related requirements of the employment position," and "with or without reasonable accommodation," the individual must be able to perform "the essential functions of the position." 29 C.F.R. § 1630.2(m).

In this case, Doane made the requisite showing that his disability does not prevent him from performing the essential functions of the job. He testified to his specific qualifications for the job; for instance, he has the necessary educational background, he has a valid motor vehicle license, he had been a successful police officer for many years, he has remained physically fit, and his eyesight is correctable to 20/20. While the medical experts all agreed that Doane's peripheral vision is limited, the medical experts also testified that Doane has made adjustments that compensate for his limited peripheral vision. Doane demonstrated that the city's job description does not specifically require binocular vision and that he had satisfactorily performed the essential functions of the job in spite of his disability for nine years before his termination in 1984. A reasonable jury could have concluded that Doane could perform the essential functions of the job,

and thus Doane sufficiently satisfied his burden to demonstrate that he was qualified for the job.

The city also argues that Doane did not fulfill the procedural requirements of the Omaha Municipal Code when a current employee attempts to change job positions. The city asserts that because Doane was attempting to transfer to a position with a higher maximum salary, he was required to go through an examination process, including a physical and mental examination and a personal interview, as any applicant seeking an original appointment. This argument is without merit. The Municipal Code provides that vacancies may be filled by re-employment as well as original appointment. (*See* Appellants' Supp.App. at 46.) Memos from city officials indicate that Doane's applications to be rehired as a police officer were treated as applications for re-employment, and thus were not subject to the procedural requirements of an original appointment. Also, Doane specifically testified that he was not permitted to try to engage in any of the testing requirements. We agree with the district court's assessment: "Due to the discrimination of the city of Omaha, the plaintiff was never given the chance to complete these standard preconditions of employment." (Appellant's Adden. at 25.) The jury had sufficient evidence before it from which it could conclude that Doane was qualified, and any technical noncompliance with the personnel code does not undermine the verdict.

C. Remedies

Following entry of the jury verdict, the district court held an evidentiary hearing and awarded remedies of

backpay and reinstatement. The city challenges these remedies, arguing that the remedy in this case should be limited to injunctive relief and should not include reinstatement or backpay damages.

The ADA provides that the Title VII remedies apply to any person alleging discrimination on the basis of a disability. 42 U.S.C. § 12117(a). Once a plaintiff proves that an unlawful motive played some part in the employment decision, *see* 42 U.S.C. § 2000e-2(m), the plaintiff is entitled to relief, including compensatory damages, declaratory judgment, and injunctive relief. *Id.* § 2000e-5(g)(2)(B); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir.1995). The defendant may attempt to limit the relief by showing that it would have made the same decision, even absent consideration of the impermissible factor. If "the employer proves that it would have made the same decision absent consideration of the employee's disability, the remedies available are limited to a declaratory judgment, an injunction that does not include an order for reinstatement or for back pay, and some attorney's fees and costs." *Pedigo*, 60 F.3d at 1301; *see* 42 U.S.C. § 2000e-5(g)(2)(B)(i) & (ii).

Because the city failed to prove that it would have taken the same action against Doane had it not considered his blindness in one eye, there is no basis for applying section 2000e-5(g)(2)(B) in this case. A person who has been discriminated against is entitled to the most complete relief possible, and there is a strong presumption that persons who have been discriminated against are entitled to back pay. *King v. Staley*, 849 F.2d 1143, 1144 (8th Cir.1988). As always, the goal is to make the victim whole. *See id.* (holding that the district court abused its

discretion in failing to award back pay and front pay based on the salary of the position that the victim of discrimination was denied). The district court's discretion was not restricted in this case to imposing injunctive relief.

In determining whether to award reinstatement, any current inability to satisfy all bona fide job requirements is a special circumstance that may render reinstatement inappropriate. *Thomlison v. City of Omaha*, 63 F.3d 786, 790 (8th Cir.1995) (a Rehabilitation Act case); *see Wooten*, 58 F.3d at 385 n. 2 (noting that cases interpreting the Rehabilitation Act of 1973 are instructive in ADA analysis). Because Doane had been out of the police force for a number of years, the district court did not reinstate Doane as a sworn, on-duty police officer but ordered the city to allow him to participate in police recruit training. This provided the city with the opportunity to train Doane and to assess anew his current fitness for the job.[3] Additionally, out of an abundance of caution, the district court provided the city with an opportunity to present evidence demonstrating that Doane was not currently fit for the job. The district court found that the city presented no evidence other than Doane's vision disability to indicate that he was unfit for the job.

The city now argues that the district court erred by shifting to it the burden to demonstrate that Doane was not qualified. We note that the jury instructions indicate that Doane properly bore the initial burden to prove that

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[3] We were informed at oral argument that Doane had been sworn in as an Omaha police officer two days before.

he was a qualified individual with a disability, and the jury found in his favor. That evidentiary burden concerning liability is separate, however, from the issue of whether reinstatement is an appropriate remedy.

The district court shifted the burden on the remedial issue of whether Doane was qualified for reinstatement, relying on *Thomlison v. City of Omaha*. In *Thomlison*, the city of Omaha was found to have discharged a fire fighter on the basis of discrimination. 63 F.3d at 789. When considering the propriety of the district court's order of reinstatement, we stated, "When analyzing whether a former employee is currently qualified for reinstatement, a presumption exists that the former employee remains qualified to perform the job. The burden shifts to the employer to prove the absence of current qualifications." *Id.* The district court in the present case applied this presumption to determine that Doane was entitled to reinstatement.

The city argues that the *Thomlison* presumption does not apply because this is not a wrongful discharge case. We disagree. The wrongful refusal to rehire situation of Doane's case is sufficiently analogous to the wrongful discharge situation of the *Thomlison* case to invoke the same presumption. The record here indicates that Doane had successfully performed this job in spite of his disability for nine years before his discharge, and his visual disability was the only reason asserted for his discharge. Subsequent to his discharge, Doane sought but was denied reinstatement on several occasions due to his visual disability. Doane's final attempt at reinstatement eight years after his discharge was his first opportunity to seek reinstatement under the ADA, and the city offered

no basis for refusing to hire Doane other than his visual disability. Given these circumstances, we conclude that the district court did not err by requiring the city in this wrongful refusal to rehire case to demonstrate that Doane was not qualified for reinstatement, in accordance with the presumption set forth in *Thomlison*.

The city also argues that the back pay award should be reduced in light of Doane's alleged failure to mitigate damages. The district court refused to consider the failure-to-mitigate issue because the city did not raise the issue at trial. Even if the issue had been raised earlier, however, the city would not prevail. The city asserts that Doane failed to mitigate damages because he applied only once for re-employment as a police officer and he voluntarily demoted himself to a lower paying job at one point. To the contrary, the record, viewed in the light most favorable to Doane, indicates that Doane made several requests for re-employment as a police officer but was denied consideration each time because of his blindness in one eye. The record also indicates that Doane left the higher-paying dispatcher job to return to the 911 communications job because it was very painful for him to be so closely aligned with police officers yet be denied the opportunity to be one again. Thus, the record would support a finding that Doane did not fail to mitigate damages.

For the foregoing reasons, we conclude that the district court did not abuse its discretion in fashioning an appropriate remedy for the city's discriminatory refusal to rehire Doane.

III.

Accordingly, we affirm the judgment of the district court. We also overrule the city's motion to strike portions of the record.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2835NEO

Royce Doane,	*	
Appellee,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	*	
City of Omaha,	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. Judge Wollman would grant the suggestion.

The petition for rehearing by the panel is also denied.

July 30, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROYCE DOANE, Plaintiff, vs. CITY OF OMAHA, a municipal corporation, Defendant.	)	8:CV94-00419 ORDER (Filed Feb. 5, 1996)

This matter is before the court on the motion of the plaintiff, Royce Doane, to supplement the record (Filing No. 31) and the motion of the defendant, the City of Omaha, for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 32). Additionally, the determination of post-trial remedies is currently pending before the court. On October 6, 1995, following a four day trial, the jury returned a verdict in favor of the plaintiff for $50,000. The plaintiff had been previously employed by the defendant as a sworn police officer, and his request for reemployment was denied because of the loss of vision in his left eye due to glaucoma. The jury was called upon to answer several questions related to the Americans With Disabilities Act (ADA): 1) whether or not the plaintiff was a qualified individual with a disability, 2) whether or not the defendant intentionally discriminated against the plaintiff because of his disability in its decision not to hire him as a sworn police officer, and 3) the amount of damages, if any, suffered by the plaintiff for future pecuniary losses, emotional pain and suffering, inconvenience, and mental anguish. The jury answered 1)

and 2) in the affirmative, and assessed $50,000 in damages against the defendant.

MOTION TO SUPPLEMENT THE RECORD

As a preliminary matter, the court has received no opposition from the defendant to the plaintiff's motion to supplement the record (Filing No. 31). The counsel for the plaintiff has represented to the court that proposed Plaintiff's Exhibits 40 and 41 are necessary to the calculation of back pay owing to the plaintiff. Upon consideration, the court will grant the plaintiff's motion to supplement the record (Filing No. 31) and the proposed Plaintiff's Exhibits 40 and 41 are deemed considered in the court's determination of appropriate post-trial remedies.

RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, FOR A NEW TRIAL

The defendant is now renewing its motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 32), pursuant to Fed. R. Civ. P. 50(b) and 59. The defendant lists two grounds in support of its motion: 1) there was no legally sufficient evidentiary basis for a reasonable jury to find for the plaintiff, and 2) the court erred in disallowing one of the defendant's proposed jury instructions.

A Rule 50(b) motion should be granted only "where the evidence is such that, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict." ***Caudill v. Farmland Industries, Inc.***, 919 F.2d 83, 86 (8th Cir. 1991). The court "must

view the evidence in the light most favorable to the prevailing party." ***Gulbranson v. Duluth, Missabe and Iron Range R.R. Co.***, 921 F.2d 139, 141 (8th Cir. 1990). The motion "should be granted only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the non-moving party." ***Id.***

The evidence adduced at trial does not lead to the reasonable conclusion that a verdict should have been rendered in favor of the defendant. The plaintiff introduced evidence of his disability through the live testimony of Dr. Stanley Truhlsen, M.D., and the video deposition of Dr. Harold Bares, M.D. Both of these individuals are ophthalmologists who examined the plaintiff, Royce Doane. Additionally, James N. Skinner, the Omaha Chief of Police, testified that he regarded Royce Doane as having a physical impairment that substantially limited his ability to see as a result of the loss of vision to his left eye. Therefore, there was ample evidence that the plaintiff was disabled, or that the defendant regarded him as being disabled, within the meaning of the ADA.

The plaintiff also presented evidence that he was qualified to perform the essential functions of the position of sworn police officer. Royce Doane testified that he had performed the essential functions of the job for nine years with his disability and this testimony was supported by several other witnesses, including Alfred J. Marchisio, Jr., a vocational rehabilitation specialist. The defendant countered with the live testimony of Dr. Hal Breedlove, O.D., an optometrist, and John Greene, a vocational rehabilitation specialist. Dr. Breedlove, although he had never actually examined the plaintiff, testified that

the diminished peripheral vision of the plaintiff would leave him unable to function as well in high stress situations as if he were not disabled. That the jury decided not to credit his testimony over that of Royce Doane and the police officers with whom he previously had served will not be disturbed by the court in considering this motion.

The jury's finding that the defendant intentionally discriminated against the plaintiff is also supported by the evidence adduced at trial. Several of the exhibits admitted into evidence supported the plaintiff's claim that the only reason for the denial of his reemployment was his sight. Perhaps most telling, however, was the admission of Chief Skinner that he had a policy of making accommodations for individuals who became disabled while working for the Police Division, but he would not make such accommodations for disabled applicants for employment. The defendant attempted to show that there was a legitimate, nondiscriminatory reason for denying reemployment to the plaintiff, namely, that he did not follow the procedural requirements for a new applicant for employment. The plaintiff, however, was not seeking employment as a new recruit. On the contrary, he was asking for *re*employment with the Omaha Police Division.

Finally, the plaintiff testified that he had undergone significant emotional anguish because of the denial of his application for reemployment. He stated that he only wanted to be a police officer and that he was forced to take a voluntary demotion from Detention Technician II to 911 Operator because the stress of being "almost a

police officer" was difficult to accept. Although the counsel for the defense belittled Royce Doane's alleged emotional pain, the jury sided with the plaintiff once again.

The court will briefly address the defendant's contention that the exclusion of the following proposed jury instruction was in error:

> INSTRUCTION NO. _____
>
> You have received instructions with respect to the standards for determining what constitutes a "disability" and the elements to be considered in determining whether "major life activities" have been affected.
>
> You are further instructed that an individual with an impairment that interferes with that individual's ability to do a particular job, but does not significantly decrease that individual's ability to otherwise obtain satisfactory employment, is not an impairment that "substantially limits" that individual in his major life activities. In other words, the fact that an individual cannot meet the requirements of one particular job, such as police officer, does not require the conclusion that the individual is disabled within the meaning of the Americans With Disabilities Act.

This proposed instruction concerns the limited "major life activity" of working. The plaintiff has never alleged that the blindness in his left eye substantially limited his ability to work. In fact, the plaintiff's theory of the case was that the blindness in his left eye only substantially limited the "major life activity" of seeing.

The plaintiff need not show that he is substantially limited in *all* major life activities. The term "disability"

under the ADA merely means a physical or mental impairment that substantially limits *one* of the major activities of life. 42 U.S.C. § 12102(2). Thus, it would be absurd for a defendant to argue that a blind man is not disabled because he can hear just as well as the general population. The defendant's only task in the instant case, with regard to whether or not the plaintiff was a "disabled" person, was to show that the plaintiff was not substantially limited in the major life activity of *seeing*. Any reference to another major life activity would have been irrelevant, immaterial, and potentially could have confused the jurors as to the genuine issues of the dispute. Accordingly, the renewed motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 32) will be denied.

POST-TRIAL REMEDIES

In determining the amount of back pay to award to the plaintiff, the court has considered the plaintiff's method of back pay calculation as set forth in his post-trial brief. Although the court received a post-trial brief from the defendant, the issue of back pay liability was never squarely addressed. The defendant concentrated instead upon the merits of the underlying dispute. Accordingly, even though the court is aware that the defendant still takes issue with the jury verdict which found the City of Omaha liable, it will be assumed that the defendant does not object to the plaintiff's method of back pay calculation.

"The district court has broad equitable discretion to fashion back pay awards in order to make the . . . victim

whole." ***E.E.O.C. v. Delight Wholesale Co.***, 973 F.2d 664, 669-70 (8th Cir. 1992). In exercising this discretion, Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(g)) contributes the basis for the determination of back pay liability under the ADA. See 42 U.S.C. § 12117(a). It provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e-5(g) (1).

A brief chronology of events is necessary to aid in the court's determination. On August 12, 1992, the plaintiff, Royce Doane, applied for reemployment as a police officer with the defendant, the City of Omaha. The plaintiff submitted to an eye examination by Dr. Harold Bares, M.D., on October 29, 1992 and received a positive evaluation. On November 30, 1992, the defendant employed a class of police recruits for training at the Omaha Police Academy. After repeated requests for an update on the status of his application, the plaintiff was informed on July 23, 1993, that his request for reemployment was

denied. After filing a charge with the Equal Employment Opportunity Commission, he filed this civil suit in the United States District Court for the District of Nebraska on August 15, 1994. On October 6, 1995, after a four-day trial, the jury returned a verdict for the plaintiff and against the defendant in the amount of $50,000 for intentional discrimination in violation of the Americans With Disabilities Act. Royce Doane was employed by the City of Omaha as a Detention Technician II from April 1991 until August 1994. He was voluntarily demoted to the position of 911 Operator in August of 1994 and has remained in that position to the present. Mr. Doane's stated reason for the voluntary demotion was the emotional pain of "almost being a police officer" which was involved in his position as a Detention Technician II.

The plaintiff is alleging that back pay accrual should have begun on November 30, 1992, the date on which the defendant employed police recruits for its police training class. The City of Omaha only takes issue with this starting date to the extent that the defendant believes Mr. Doane is only entitled to file an application and compete with the approximately 1,000 other applicants for positions as police recruits.

"An applicant denied employment in violation of the civil rights laws is 'ordinarily [ ] entitled to an award of back pay from the date of [the discriminatory action] until the date of judgment.' " ***Sands v. Runyon***, 28 F.3d 1323, 1327 (2d Cir. 1994), **quoting** ***Saulpaugh v. Monroe Community Hosp.***, 4 F.3d 134, 144 (2d Cir. 1993). The focus of the inquiry must rest on the date of the discriminatory action of the City of Omaha which resulted in the decision not to rehire the plaintiff. The defendant was in

possession of a positive medical evaluation by Dr. Harold Bares, M.D., on October 29, 1992. The City of Omaha then requested clarification of Dr. Bares' opinion and this was received on November 23, 1992. At this point, the defendant had all information necessary to render its decision regarding the plaintiff's request for reemployment. Instead of timely rendering its decision, however, the City of Omaha delayed its response until July 23, 1993. Had the defendant promptly submitted Mr. Doane's application to the City of Omaha Personnel Board, Mr. Doane could have begun reemployment at the same time as the new police recruits on November 30, 1992. Accordingly, the court finds that back pay liability began to accrue from that date.

The plaintiff has submitted an exhibit in support of his argument for back pay which is highly relevant to the issue before the court (Plaintiff's Exhibit 41). This document was generated by the City Payroll Division and compares the salary received by Royce Doane with the salary of a new police recruit beginning on November 30, 1992 and ending on October 7, 1995. During this period of time, a new police recruit earned $113,018.89 and Royce Doane received $89,465.39. Therefore, from a salary perspective, the City of Omaha owes $23,553.50 to the plaintiff, Royce Doane. The defendant argues that this amount should be reduced or eliminated because of the plaintiff's alleged failure to mitigate damages in seeking his voluntary demotion from Detention Technician II to 911 Operator. Having considered the testimony of the plaintiff and the exhibits in the record, the court finds that the plaintiff left the position of Detention Technician II because of

unreasonable working conditions and has satisfied his duty to mitigate damages in accordance with the ADA.

This is not the end of the inquiry. During that same period of time, from November 30, 1992 to October 7, 1995, the City of Omaha contributed 10.4% of a police officer's salary to the Police and Fire Pension System while only 5.1% of Royce Doane's salary was contributed to the City's Civilian Pension System. This means that while a police officer had $11,753.96 (10.4% of $113,018.89) contributed to the Police and Fire Pension System during the relevant period of time, Royce Doane's pension plan only received $4,562.73 (5.1% of $89,465.39). Accordingly, Royce Doane suffered a loss of $7,191.23 in pension benefits and is due a total of $30,744.23 in back pay from the City of Omaha.

After awarding back pay to the plaintiff in an ADA civil suit, the court has the discretion to order the payment of prejudgment interest, as well. **See *E.E.O.C. v. Delight Wholesale Co.***, 973 F.2d 664, 671 (8th Cir. 1992); ***Hogan v. Bangor & Aroostook Railroad Co.***, 61 F.3d 1034, 1038 (1st Cir. 1995); ***Green v. USX Corp.***, 843 F.2d 1511, 1530 (3d Cir. 1988), *vacated and remanded on other grounds*, 490 U.S. 1103 (1989).

> As a general rule, prejudgment interest is to be awarded when the amount of the underlying liability is reasonably capable of ascertainment and the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of money which was legally due.

Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743, 752 (8th Cir. 1986). Since the different salaries of a

police officer and Royce Doane are not in dispute, the instant case involves a certain amount of back pay liability. Therefore, upon consideration, the court will award prejudgment interest in order to make the plaintiff whole.

The plaintiff argues, and the court agrees, that the appropriate rate of prejudgment interest can be determined by reference to 28 U.S.C. § 1961. This section has previously been used in this district in the calculation of Title VII prejudgment interest. **See *Hatley v. Store Kraft,*** No. 4:CV93-3170, Filing No. 74, Order entered by Judge Richard G. Kopf (D. Neb. filed October 25, 1994).

> Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . . Such interest shall be calculated . . . at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

28 U.S.C. § 1961(a). The effective fifty-two week treasury bill rate as of the date of the jury's verdict was 5.52%. Accordingly, the calculation of prejudgment interest is as follows: Prejudgment Interest = [(Total Back Pay Liability) X (T-Bill Interest Rate/12) X (Months of Back Pay Liability)]. In the instant dispute, this calculation results in an award of prejudgment interest of: $4,836.68 = [($30,744.23) X (.0552/12) X (34.2 months)] .

FRONT PAY AND/OR REINSTATEMENT

A question which must be saved for a later day concerns the issue of front pay and/or reinstatement. The

recent Eighth Circuit case of ***Thomlinson v. City of Omaha,*** 63 F.3d 786 (8th Cir. 1995), has set forth the procedural requirements for determining the availability of front pay or reinstatement to a public safety officer. Generally, "[w]hen analyzing whether a former employee is currently qualified for reinstatement, a presumption exists that the former employee remains qualified to perform the job. The burden shifts to the employer to prove the absence of current qualifications." ***Id.*** at 790. With regard to a firefighter in that case and presumably to police officers as well, "[g]iven the importance of public safety and the potential hazards involved in requiring the City to employ an unfit worker," ***Id.,*** an explicit determination of current fitness for the job is required.

Therefore, the court will hold an evidentiary hearing wherein the issues of current physical fitness, provisional front pay until a certain level of fitness is attained, and/or potential reasonable accommodations for the plaintiff may be more fully developed. The court emphasizes that the burden of proof rests on the defendant, the City of Omaha, to show that the plaintiff is currently unfit for employment as a sworn police officer. Additionally, there will be no further need for evidence on the issue of the plaintiff's sight, as the jury has already determined that Mr. Doane's disability does not affect his ability to perform the essential functions of the job. Furthermore, Mr. Doane will not be required to submit to any tests or fitness requirements which are not already required of current police officers. To require otherwise would be to subvert the intentions of the ADA. Accordingly,

IT IS ORDERED:

1. The plaintiff's motion to supplement the record (Filing No. 31) is granted.

2. The defendant's renewed motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 32) is denied.

3. The plaintiff is awarded the amount of $35,580.91 in back pay ($30,744.23) and prejudgment interest on back pay ($4,836.68).

4. An evidentiary hearing on the issues of current physical fitness, front pay, and reinstatement will be held on February 26, 1996 commencing at 1:30 p.m. Both parties shall submit a hearing memorandum to the undersigned magistrate judge on or before February 22, 1996.

DATED this 5th day of February, 1996.

BY THE COURT:

/s/ Thomas D. Thalken
THOMAS D. THALKEN
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROYCE DOANE, Plaintiff, vs. CITY OF OMAHA, a municipal corporation, Defendant.	)	8:CV94-00419 MEMORANDUM OPINION AND ORDER (Filed May 1, 1996)

This matter is before the court pursuant to the evidentiary hearing held on February 26, 1996 at 1:00 p.m. At that time, the court received evidence and heard arguments regarding the issues of current physical fitness, front pay, and reinstatement of the plaintiff, Royce Doane. The court received proposed findings of fact, proposed conclusions of law, and proposed remedies from the parties on March 8, 1996.

On October 6, 1995, the jury returned a verdict in favor of the plaintiff for $50,000 on his claim of discrimination in violation of the Americans with Disabilities Act (ADA). The court then awarded $35,580.91 to the plaintiff in back pay and prejudgment interest. **See** Filing No. 33. Now the court must determine whether or not the plaintiff is entitled to be reinstated as a police officer with the Omaha Police Division, and whether or not the plaintiff is entitled to front pay.

FINDINGS OF FACT

The plaintiff, Royce Doane, was employed by the City of Omaha from June 20, 1973 to June 2, 1984 as a sworn police officer. See Filing No. 22, Instruction No. 10 at ¶ 7. At the time the plaintiff was hired as a sworn police officer, he apparently was not experiencing any difficulties with his vision. However, approximately two years after joining the force, Doane had contracted glaucoma, a disease involving increased intraocular ("inside the eye") pressure. Because of this increased intraocular pressure, Doane suffered damage to the optic nerve in his left eye. By 1976, Doane's vision in his left eye had deteriorated to 20/200 which constitutes legal blindness. In 1979, to prevent similar damage to his right eye, Doane underwent an operation known as a trabeculectomy. This procedure involves a venting of fluid from the interior of the eye to the exterior, thus lowering the intraocular pressure. Notwithstanding Doane's vision difficulties, he maintained his position as a sworn police officer with the Omaha Police Department until 1984. The court heard testimony at trial that it was common knowledge in the Police Division that Doane had lost the vision in his left eye. Nevertheless, in June of 1984, purportedly because of the blindness in his left eye, the plaintiff was forced to resign his position as a sworn police officer and he was transferred to a position as a 911 Operator.

Doane attempted, on several occasions from 1984 to 1992, to become reemployed as a sworn police officer. He took a job as a Detention Technician II with the City of Omaha in April of 1991; however, he transferred back to his position as a 911 Operator in August of 1994.

On August 12, 1992, Doane once again applied for reemployment by the City of Omaha as a sworn police officer. On October 29, 1992, because of the difficulty with his vision and at the request of the City of Omaha, the plaintiff was examined by Dr. Harold Bares, M.D. Dr. Bares' evaluation of Doane was a positive one. On November 30, 1992, the City of Omaha began a police recruit training class at the Omaha Police Academy.

Doane repeatedly requested an update on the status of his application for reemployment, and on July 23, 1993, he was informed by Thomas Marfisi, Acting Personnel Director for the City of Omaha, that his application was denied. Doane filed a charge with the Equal Employment Opportunity Commission, and then filed the instant suit in this district. The basis for Doane's suit was a violation of the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.*, which became effective on July 26, 1992.

In returning a verdict in favor of the plaintiff, the jury had to determine that the City of Omaha had discriminated against Royce Doane because of his disability when it failed to rehire him. Whether or not Royce Doane complied with the procedural requirements in applying for employment by the Omaha Police Division, the jury found that "the fact that the plaintiff was a qualified person with a disability was a motivating factor in the defendant's decision not to hire the plaintiff." Filing No. 22, Instruction No. 12.

During the trial of this case, as well as the evidentiary hearing of February 26, 1996, the court heard testimony that the job requirements of a police officer today has substantially changed since Royce Doane last served

as a police officer in 1984. Indeed, the plaintiff has acknowledged this fact by stating that "in view of the prospect of changes and modifications in Police Officer responsibilities, roles, and techniques since Plaintiff last served as a sworn Police Officer, it is appropriate for Plaintiff to undergo Police Recruit training at the next class which commences on September 9, 1996." Plaintiff's Proposed Findings of Fact and Conclusions of Law at 1.

Nevertheless, in returning a verdict for the plaintiff the jury had to find that Royce Doane could "perform the essential functions of the employment position for which [he] applied." Filing No. 22, Instruction No. 17. Neither during the trial of this case, nor at the evidentiary hearing on February 26, 1996, did the defendant introduce any evidence, save that regarding the plaintiff's vision disability, that Royce Doane is currently unfit to perform the duties of a sworn police officer.

According to the defendant's rules for reemployment with the Omaha Police Department, "[i]ndividuals who seek reemployment with the Omaha Police Department as sworn personnel must have approval of the City Personnel Board." Evidentiary Hearing of February 26, 1996, Exhibit 5 at 63. Those rules further state that "[f]or individuals whose reemployment is approved within one (1) year of the effective date of their resignation, the written examination will be waived. Otherwise, no standard preconditions of employment will be waived." ***Id.*** These preconditions include a written examination (unless waived as above), a personal interview, a physical fitness test, and medical/psychological/psychiatric evaluations. **See** ***Id.*** Due to the discrimination of the City of Omaha,

the plaintiff was never given the chance to complete these standard preconditions of employment.

The rules for reemployment also require that "[a]ny individual reemployed more than two (2) years after his/her effective resignation date shall repeat the entire police recruit training program during the next scheduled recruit class." *Id.* at 64. There is no disagreement that this rule would have been applicable to the plaintiff in 1992. "The plaintiff was employed as a police officer for the City of Omaha from June 20, 1973, to June 2, 1984." Filing No. 22, Instruction No. 10 at ¶ 7. "On August 12, 1992, [the p]laintiff applied for employment as a police officer with the Omaha Police Division and was denied such employment on July 23, 1993, by Thomas Marfisi, Acting Personnel Director." *Id.* at ¶ 5. "The City of Omaha employed police officer recruits on November 30, 1992 for its police training class on that date." *Id.* at ¶ 6. Accordingly, the court finds that if the City of Omaha had not discriminated against the plaintiff, he would have entered the next scheduled recruit class on November 30, 1992.

Finally, the rules for reemployment with the Omaha Police Department provide that "[a]ny reemployed individual will begin at the entry level classification and wage step." Evidentiary Hearing of February 26, 1996, Exhibit 5 at 63. The plaintiff does not dispute the applicability of this rule to his situation in 1992. The parties have stipulated that the wages actually earned by Royce Doane during the period from November 30, 1992 to February 24, 1996 were $100,925.55. **See** Filing No. 40, Exhibit 8. The parties have also stipulated that an individual who entered the police recruit training class on

November 30, 1992, hereinafter the "Comparator Officer," would have earned $128,308.68 from that date until February 11, 1996. **See** ***Id.***, Exhibit 9. The parties have agreed that the Comparator Officer "was advanced to the Police Officer Pay Range Step "E" on November 30, 1995 and will be eligible for advancement to Pay Step "F" on November 30, 1996." Filing No. 40 at 1.

The plaintiff has asserted that during 1996, he earned an average wage of $582.66 per week and that the Comparator Officer earned an average wage of $1,045.49 per week. This is consistent with the record before the court and the defendant has not presented any evidence to the contrary. Thus, the average weekly wage differential between Royce Doane and the Comparator Officer of during 1996 was $462.83. Accordingly, from November 30, 1992 to May 1, 1996, Royce Doane earned approximately $106,577.97 and the Comparator Officer earned approximately $140,227.27. This represents a salary differential of $33,649.30 as of the date of this order.

As noted in the court's order of February 5, 1996, during the relevant period of time "the City of Omaha contributed 10.4% of a police officer's salary to the Police and Fire Pension System while only 5.1% of Royce Doane's salary was contributed to the City's Civilian Pension System." Filing No. 33 at 10. Accordingly, from November 30, 1992 to May 1, 1996, the City of Omaha contributed $5,435.48 to the pension fund of the plaintiff (5.1% of $106,577.97), while it contributed $14,583.64 to the pension fund of the Comparator Officer (10.4% of $140,227.27). This represents a pension benefits differential of $9,148.16 as of the date of this order.

CONCLUSIONS OF LAW

"When analyzing whether a former employee is currently qualified for reinstatement, a presumption exists that the former employee remains qualified to perform the job. The burden shifts to the employer to prove the absence of current qualifications." ***Thomlison v. City of Omaha,*** 63 F.3d 786, 790 (8th Cir. 1995). However, with regard to a position such as a firefighter or police officer, an explicit determination of current physical fitness is necessary. **See *Id.*** In the instant case, the City of Omaha was given the opportunity to present evidence, at trial and at the hearing on February 26, 1996, that Royce Doane does not currently possess the level of physical fitness required to perform the functions of a sworn police officer. As the City declined to present such evidence, the court must presume that Royce Doane would be able to perform those functions.

"Reinstatement is generally the preferred remedy where unlawful discrimination results in discharge." ***Dutton v. Johnson County Board of County Commissioners,*** 868 F. Supp. 1260, 1264 (D. Kan. 1994), **citing *Jackson v. City of Albuquerque,*** 890 F.2d 225, 231-35 (10th Cir. 1989). The instant case is a factual hybrid of sorts as the court is not faced with a situation in which a police officer was discharged from duty for discriminatory reasons. However, neither is this a situation in which an individual with no relationship to the Omaha Police Division has been discriminatorily denied employment.

The unique factual situation, however, makes little difference in deciding the appropriate remedy for Royce Doane. "If an employer violates the ADA, an employee is

entitled to those remedies available to employees under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a)." ***Dutton,*** 868 F. Supp. at 1262-63.

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1). This broad range of available remedies clearly gives the court discretion to order the City of Omaha to place Royce Doane in the police recruit training class of September 9, 1996. Without any evidence that Doane would be physically unfit to perform the functions of a police recruit, the court must presume him fit. Accordingly, the court will order the plaintiff's reemployment by the defendant as a sworn police officer.

The court, having considered the plaintiff's previous employment as a sworn police officer with the City of Omaha and his current employment as a 911 Operator, will not require the plaintiff to undergo the battery of preconditions and tests normally required of individuals seeking reemployment. This will preclude the defendant from denying the plaintiff reemployment for pretextual reasons. The defendant may not terminate the plaintiff's employment as a sworn police officer for failure to comply with the vision requirements of the Omaha Police Department unless his vision drops below the level of vision correctable to 20/20 using *both* eyes.

The court will now take the opportunity to update its order of February 5, 1996 (Filing No. 33) regarding the determination of back pay liability. The analysis expressed in that order remains valid, however, the amount of liability must be updated to reflect the date of judgment. "[T]he calculation of prejudgment interest is as follows: Prejudgment Interest = [(Total Back Pay Liability) X (T-Bill Interest Rate/12) X (Months of Back Pay Liability)]." Filing No. 33 at 11-12. "The effective fifty-two week treasury bill rate as of the date of the jury's verdict was 5.52%." *Id.* at 11.

The court, in the exercise of its equitable powers under 42 U.S.C. § 2000e-5(g)(1), will separate the back pay liability into two components: 1) salary back pay and 2) pension benefits back pay. As previously noted, the salary differential between Royce Doane and the Comparator Officer from November 30, 1992 to May 1, 1996 was $33,649.30. Accordingly, an award of $6,350.90 in salary back pay prejudgment interest is appropriate: $6,350.90 [($33,649.30) X (.0552/12) X (41.03 months)]. The pension benefits differential between Royce Doane and the Comparator Officer during the same period of time was $9,148.16. Therefore, an award of $1,726.61 in pension benefits back pay prejudgment interest is appropriate: $1,726.61 = [($9,148.16) X (.0552/12) X (41.03 months)].

Finally, the City of Omaha has attempted to raise the issue of failure to mitigate damages in its brief submitted to the undersigned magistrate judge on March 8, 1996. The defendant now argues that "[t]he plaintiff has failed to mitigate damages, by seeking employment as law [sic] enforcement officer from surrounding communities, or by seeking employment with the City of Omaha as a law

enforcement officer on the three subsequent occasions of vacancies, thus the plaintiff is not entitled to back nor front pay." Defendant's Brief at 6-7. As this issue was not raised by the defendant at trial, the court will not consider it now. Accordingly, a judgment consistent with the terms of this memorandum opinion and order shall issue forthwith.

DATED this 1st day of May, 1996.

BY THE COURT:

/s/ Thomas D. Thalken
THOMAS D. THALKEN
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROYCE DOANE, Plaintiff, vs. CITY OF OMAHA, a municipal corporation, Defendant.	8:CV94-00419 MEMORANDUM OPINION AND ORDER (Filed Jun. 21, 1996)

This matter is before the court pursuant to the application of the plaintiff, Royce Doane, for attorney's fees (Filing No. 43), the motion of the defendant, the City of Omaha, for judgment as a matter of law or for new trial (Filing No. 46), and the motion of the defendant for an enlargement of time (Filing No. 47) in which to respond to the plaintiff's application for attorney's fees (Filing No. 43). As an initial matter, the court will grant the defendant's motion for an enlargement of time (Filing No. 47); the defendant's "Brief in Response to Plaintiff's Motion for Attorney Fees," submitted to the undersigned magistrate judge on May 31, 1996, is deemed considered.

PROCEDURAL BACKGROUND[1]

The plaintiff originally filed his complaint (Filing No. 1) on August 15, 1994. He asserted three causes of action:

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[1] The court will not belabor the record with yet another recitation of the facts surrounding the instant case. However, for the purpose of addressing the pending motions, it is important to set forth the relevant procedural history of the lawsuit.

1) a violation of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, when his reinstatement by the defendant was denied; 2) a violation of the Nebraska Fair Employment Practice Act (NFEPA), Neb. Rev. Stat. § 48-1101, *et seq.*, when his reemployment by the defendant was denied; and 3) a failure by the defendant to provide reasonable accommodations to the plaintiff pursuant to the ADA.[2] On July 17, 1995, following the pretrial conference, the parties consented to trial before the undersigned magistrate judge. This consent was approved by Chief Judge William G. Cambridge on July 20, 1995 and was filed with the Clerk of the Court (Filing No. 12).

The jury trial of this matter commenced on October 2, 1995. The plaintiff rested his case on October 4th, and the defendant made an oral motion for judgment as a matter of law. This motion was taken under advisement by the court and the trial was permitted to proceed. **See** Filing No. 20. The defendant rested its case on October 5th, and renewed its oral motion for judgment as a matter of law. The plaintiff also made an oral motion for judgment as a matter of law at the conclusion of the evidence. The court overruled the defendant's motions, took the plaintiff's motion under advisement, and submitted the case to the jury. **See** Filing No. 21. The jury returned a verdict in the amount of $50,000 for the plaintiff on October 6, 1995 at 12:15 p.m.

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[2] The NFEPA claim was not pursued at trial and only one claim of an ADA violation was ultimately presented to the jury.

On October 20, 1995, pursuant to Fed. R. Civ. P. 50(b) and 59, the defendant filed a motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 32). The court denied this motion on February 5, 1996 and awarded the plaintiff $35,580.91 in back pay. **See** Filing No. 33. On February 20, 1996, the defendant filed a motion to alter judgment pursuant to Fed. R. Civ. P. 59(e) (Filing No. 35). As judgment had yet to be entered in this case, that motion (Filing No. 35) was construed to be a motion for reconsideration of the court's order of February 5, 1996 (Filing No. 33) and was denied on February 28, 1996 (Filing No. 39).

The court held an evidentiary hearing on February 26, 1996 at 1:30 p.m. to determine the appropriateness of an award of front pay or reinstatement. On May 1, 1996, the court determined that in the absence of any evidence that the plaintiff was physically unfit to perform the functions of a sworn police officer, he should be placed "in the police recruit training class of September 9, 1996." Filing No. 41 at 10. The court entered judgment for the plaintiff and against the defendant on that same date (Filing No. 42). The plaintiff was awarded the following: 1) $50,000 in accordance with the verdict of the jury, 2) reemployment as a sworn police officer in the police recruit training class of September 9, 1996, 3) salary and pension benefits equivalent to an officer entering the police recruit training class on November 30, 1992 in lieu of his current salary as a 911 Operator, 4) $40,000.20 in back pay, and 5) $10,874.77 in back pension benefits. **See** Filing No. 42.

The plaintiff filed his application for attorney's fees (Filing No. 43) on May 3, 1996, and filed a bill of costs

(Filing No. 44) on May 10, 1996. Costs, in the amount of $1,773.61, were taxed by the Clerk of the Court on May 10th (Filing No. 45). The defendant filed the instant motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 46) on May 14, 1996.

ANALYSIS

A. Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial (Filing No. 46)

This is essentially the defendant's fifth motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 and the third motion for a new trial pursuant to Fed. R. Civ. P. 59. The defendant asserts the following reasons for the instant motion:

> 1. There is no legally sufficient evidentiary basis for a reasonable jury to find that the defendant City of Omaha is subject to liability pursuant to the Americans with Disabilities Act;
>
> 2. There was no legally sufficient basis for the Court to deny the defendants [sic] motion for new trial; and,
>
> 3. That [sic] was no legally sufficient basis for an order of reinstatement, an award of back pay or front pay . . .

Filing No. 46 at 1.

The first two reasons for filing the motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 46) are, for all practical purposes, requests for reconsideration of the court's orders of February 5, 1996 (Filing No. 33) and February 28, 1996 (Filing

No. 39). The court will decline the invitation to revisit these issues again. However, the defendant also takes issue with the court's award of back pay, front pay, and reinstatement on May 1, 1996 (Filing Nos. 41 and 42). The court will address each of the defendant's new concerns *seriatim*.

1. Applicability of the *Thomlison* Case

The defendant argues that "[t]he court erred in determining that the [sic] ***Thomlison v. City of Omaha,*** [63 F.3d 786 (8th Cir. 1995)], a wrongful termination case, placing the burden on the defendant to demonstrate the plaintiff's unfitness for the position of firefighter, was controlling in this alleged wrongful failure to hire case." Filing No. 46 at 3.

The City of Omaha argues that ***Thomlison*** should not be applicable to a failure to hire situation. The City may be correct, as the Eighth Circuit has apparently not had the opportunity to decide the applicability of ***Thomlison*** to failure to hire situations involving public safety officers. Assuming, *arguendo*, that the City is indeed correct, this does nothing to aid its case. ***Thomlison*** requires that, "[g]iven the importance of public safety and the potential hazards involved in requiring the City to employ an unfit worker, . . . an explicit determination [of current physical fitness is] necessary." ***Id.*** at 790. If ***Thomlison*** is not applicable, the court can simply order the reemployment of the plaintiff without such an "explicit determination".

Were the court to order the plaintiff reemployed by the Omaha Police Division as a sworn police officer "on the beat", such a determination would unquestionably be

necessary under ***Thomlison.*** However, in the instant case, the plaintiff was not ordered to be placed "on the beat", rather he was ordered to be placed in the police recruit *training* class to commence on September 9, 1996. This should have alleviated the defendant's concerns that "the job requirements of a police officer has [sic] substantially changed since Royce Doane last served as a police officer in 1984." Defendant's Brief at 13.

Nevertheless, the court, out of an abundance of caution, allowed the defendant an opportunity during the evidentiary hearing of February 26, 1996 to present evidence which would show that Royce Doane is currently unfit to be employed as a sworn police officer. The court noted, in its order of May 1, 1996, that "[n]either during the trial of this case, nor at the evidentiary hearing on February 26, 1996, did the defendant introduce any evidence, save that regarding the plaintiff's vision disability, that Royce Doane is currently unfit to perform the duties of a sworn police officer." Filing No. 41 at 5. The City argues that the evidence presented at trial and at the evidentiary hearing regarding the changes in job requirements and training since 1984 demonstrate the plaintiff's current unfitness. Additionally, the City asserts that the burden at trial is on the plaintiff "to demonstrate that he was qualified for the position, and he did not meet that burden." Defendant's Brief at 14.

The defendant is correct that the initial burden was on the plaintiff to prove that he was a qualified individual with a disability. Filing No. 22, Instruction No. 12. However, the plaintiff's burden at trial is completely different from the defendant's burden at the evidentiary hearing. Basically, the defendant is confused about the

difference between the "essential functions of the employment position" within the meaning of the ADA, and "current physical fitness" within the meaning of ***Thomlison***.

In order to return a verdict in favor of the plaintiff at trial, the jury had to decide that Royce Doane was able to "perform the essential functions of the employment position for which [he] applied." Filing No. 22, Instruction No. 17. The burden of proof on this issue, at trial, was on the plaintiff. At the evidentiary hearing of February 26, 1996, however, the burden was shifted to the defendant to prove that Royce Doane did not possess the current qualifications to perform the job. **See *Thomlison,*** 63 F.3d at 790.

The defendant provided ample evidence at trial that "[s]ince 1984, crime prevention has become more dangerous to officers and the public." Defendant's Brief at 9. However, no evidence was provided that Royce Doane, after completing the current police recruit training course at the Omaha Police Academy, would be unable to respond to those changes. The defendant continues to argue that Royce Doane is unable to perform the essential functions of a sworn police officer; it lost this argument in front of the jury and the court will not overturn the verdict now.

The *only* issue regarding front pay and reinstatement that the City should have been arguing at the evidentiary hearing was the issue of Royce Doane's current fitness for the job. In the court's order of February 5, 1996 (Filing No. 33); the defendant was invited to gather evidence regarding the plaintiff's current physical fitness. The City

declined the invitation and it will not be permitted to continue its jury argument before this court. If ***Thomlison*** was not applicable to the instant case, the court could have ordered the City to place Royce Doane in the first available recruit training class without giving the City the benefit of the February 26, 1996 evidentiary hearing. If ***Thomlison*** required an "explicit determination" of Royce Doane's current fitness for the position of sworn police officer, that requirement was satisfied at the evidentiary hearing.

2. Propriety of Reemployment vs. Opportunity to Compete

The defendant argues that Royce Doane should not have been granted reemployment with the Omaha Police Division. Rather, according to the City of Omaha, he should only be given "an opportunity to compete through the examination process for a job." Filing No. 46 at 4. Apparently, the City's argument is based upon the premise that the plaintiff was applying for employment as a "new hire", as opposed to "reemployment", within the meaning of Chapter 23 of the Omaha Municipal Code. This contention is absurd.

On August 12, 1992, Royce Doane sent an inter-office memo to George Ireland. Mr. Ireland was the Personnel Director for the City of Omaha at that time. In that memo, Royce Doane stated, in part, "I would like to be considered for *re-employment* as an Omaha Police Officer." Plaintiff's Trial Exhibit 7 (*emphasis added*). The City of Omaha clearly did not regard Royce Doane's request as that of a "new hire". Paul L. Murphy, the Benefits Manager of the

Omaha Personnel Department, noted on October 23, 1992 that "Mr. Doane has now addressed a letter to our personnel director asking for *re-employment* as a police officer." Plaintiff's Trial Exhibit 8 at 1 (*emphasis added*).

Police Chief James N. Skinner, in an inter-office memo wrote: "I believe Mr. Doane wrote Personnel Director George Ireland asking that he be *reemployed* as a Police Officer." Plaintiff's Trial Exhibit 13 (*emphasis added*). The City's Workers' Compensation Coordinator, Susan Funkhouser, in a memo to Thomas C. Marfisi, Acting Personnel Director, wrote: "On August 12, 1992, Mr. Doane submitted a request for *re-employment* to George Ireland, Personnel Director, based on his belief that he met the eye sight requirement of a police recruit, and that even though he did not have sight in his left eye, the Americans With Disabilities Act would allow him to be *re-employed*." Plaintiff's Trial Exhibit 14 at 1 (*emphasis added*). Additionally, Mr. Murphy, Mr. Marfisi, and Chief Skinner all titled memoranda as regarding Royce Doane's *reemployment*. **See** Plaintiff's Trial Exhibits 15, 20 and 21.

Finally, in a letter to Royce Doane dated July 23, 1993, Mr. Marfisi stated the following: "We have reviewed your request for *reemployment* as a police officer with the City of Omaha. . . . [I]t is our decision to deny your request for *reemployment*." Plaintiff's Trial Exhibit 22 (*emphasis added*). In light of this evidence, it is difficult for the court to perceive the good faith basis for making the claim that Royce Doane's August 12, 1992 request for reemployment as a sworn police officer was treated as that of a "new hire" by the City or Royce Doane, and why it should be so treated by the court.

3. Possibilities of Pretextual Denial of Employment

The defendant argues that "[t]here was no evidence presented to support a finding the Plaintiff wold [sic] be denied employment for pretextual reasons if he was required to comply with the reemployment provisions of the Omaha Police Department." Filing No. 46 at 3. The court never found that the City of Omaha would deny employment to Royce Doane for pretextual reasons if he were required to complete the preconditions and tests normally required of individuals seeking reemployment. The order of May 1, 1996 (Filing No. 41) simply *precluded* such a possibility from occurring. Considering the defendant's past discrimination against the plaintiff, as well as the continued opposition to his reemployment, this condition is well within the equitable discretion of the court.

4. Repayment of Proportionate Share of Pension Contributions

The court has received into evidence a copy of the reemployment procedures for sworn personnel with the City of Omaha (Evidentiary Hearing of February 26, 1996, Exhibit 5). Those procedures contain, *inter alia*, the following requirement:

> Any individual who was a member of the Police and Fireman's Retirement System at the time of his/her resignation from the Omaha Police Department and has reached thirty (30) years of age at the time of his/her reemployment shall, as a condition of reemployment, repay in a lump sum to the Police and Fireman's Retirement System all refunded contributions together with

> interest thereon at the rate of four (4%) percent per annum.

Evidentiary Hearing of February 26, 1996, Exhibit 5 at 63. The court has received no evidence that any contributions were refunded to Royce Doane when he resigned from the Omaha Police Division in 1984. Accordingly, the court finds this argument of the defendant to be without merit.

5. Failure to Mitigate Damages

The defendant apparently has two concerns about mitigation of damages. The defendant argued in its post-trial brief that "Doane's failure to mitigate damages, by affirmatively seeking and obtaining a demotion, thus voluntary [sic] reducing his earnings should cut off a back pay award." Defendant's Post-Trial Brief at 7. The court notes that "Mr. Doane's stated reason for the voluntary demotion was the emotional pain of 'almost being a police officer' which was involved in his position as a Detention Technician II." Filing No. 33 at 8. The court squarely addressed this argument by the defendant in stating that "[h]aving considered the testimony of the plaintiff and the exhibits in the record, the court finds that the plaintiff left the position of Detention Technician II because of unreasonable working conditions and has satisfied his duty to mitigate damages in accordance with the ADA." Filing No. 33 at 10.

The defendant's second argument is as follows: "The plaintiff has failed to mitigate damages, by seeking employment as [sic] law enforcement officer from surrounding communities, or by seeking employment with the City of Omaha as a law enforcement officer on the

three subsequent occasions of vacancies, thus the plaintiff is not entitled to back nor front pay." Defendant's Proposed Findings of Fact and Conclusions of Law at 6-7.[3] This argument was raised by the defendant for the first time on March 8, 1996, five months after the conclusion of the trial. There is no mention of mitigation of damages as a controverted issue in the "Order on Final Pretrial Conference" (Filing No. 11), the "Amendment to Final Pretrial Conference" (Filing No. 16), or the defendant's trial brief.

"[T]he burden is on the defendant to prove failure to mitigate." ***Muldrew v. Anheuser-Busch, Inc.***, 728 F.2d 989, 992 (8th Cir. 1984), **citing** ***Hegler v. Board of Education,*** 447 F.2d 1078, 1081 (8th Cir. 1971). Furthermore, "[t]he defendant has to show that the plaintiff failed to use reasonable care and diligence and that there were jobs available which the plaintiff could have discovered and for which the plaintiff was qualified." ***Coleman v. City of Omaha,*** 714 F.2d 804, 808 (8th Cir. 1983), **citing** ***Hegler,*** 447 F.2d at 1081.

Considering the vehement opposition that the City of Omaha has given to Royce Doane's employment as a sworn police officer, it is somewhat disingenuous of the

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[3] It would have been much easier to follow the defendant's arguments had there been a better attempt to direct the court's attention to specific portions of the testimony of the various witnesses at trial. The defendant apparently never ordered a transcript of the trial from the court reporter and, without reference to page and line numbers, citations such as "Plaintiff's Testimony" and "Witness Marfisi" are ineffectual.

City to suggest that he should have applied for employment on the three subsequent occasions when there were vacancies with the Omaha Police Division. Any such application would have been futile, and the plaintiff was not required to mitigate his damages in this fashion.

Additionally, the law is contrary to the City's argument that Royce Doane should have sought employment as a law enforcement officer with surrounding communities. Although the burden is on the City to do so, it has not directed the court's attention to any specific employment opportunities in surrounding communities that Royce Doane would have been qualified to obtain. In any event, the plaintiff "cannot be required to move from his home 'in order to reduce damages caused by the [defendant's] unlawful acts.' " ***Coleman,*** 714 F.2d at 808, **quoting *Hegler,*** 447 F.2d at 1081. Accordingly, the City's tardy attempt to inject a mitigation of damages issue into this dispute must fail. The defendant's motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 46) will be denied.

B. Plaintiff's Application for Attorney's Fees (Filing No. 43)

The ADA provides, in part, that "the court . . . may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. In its motion for attorney's fees, a prevailing party should "support its application with appropriate and reliable evidence and authority. Affidavits and any written argument to be made should be submitted with the fee application." NELR 83.14.

The plaintiff is seeking a total of $63,452.50 in attorneys' fees for the time spent litigating this case. Specifically, the plaintiff seeks compensation for Thomas F. Dowd at $175.00/hour in the amount of $57,050.00; for Michael P. Dowd at $125.00/hour in the amount of $5,562.50; and for Timothy S. Dowd at $60.00/hour in the amount of $840.00. The City of Omaha opposes the hourly rates requested and the reasonableness of the hours expended. The court notes at the outset that the plaintiff has made an error in calculating the total hours requested. Instead of 326.00 hours, as noted in the affidavit of Thomas F. Dowd, the billing records reflect that 328.00 hours were expended. The court will not penalize the plaintiff for this mathematical error and will consider those two hours in determining a reasonable fee for Thomas F. Dowd.

1. Hourly Rate

The plaintiff is requesting the following hourly rates for his attorneys:

Thomas F. Dowd	$175.00/hour
Michael P. Dowd	$125.00/hour
Timothy S. Dowd	$60.00/hour

In support of these hourly rate requests the plaintiff has filed the affidavit of Robert V. Broom (Filing No. 43, Exhibit A). Mr. Broom "is an attorney currently practicing in Omaha, Douglas County, Nebraska, and has been a practicing member of the Nebraska Bar since 1971." *Id.* at ¶ 1. Attached to Mr. Broom's affidavit are the billing records for the instant case. Additionally, the plaintiff has filed the affidavits of Thomas F. Dowd (Filing No. 43,

Exhibit B), Michael P. Dowd (Filing No. 43, Exhibit C), and Timothy S. Dowd (Filing No. 43, Exhibit D).

The defendant contends that the attorneys in this case should "be compensated at a [sic] hourly rate not to exceed $100.00 per hour." Defendant's Brief at 7. In support of this argument, the City of Omaha has purported to submit: 1) a June 1994 survey of the Nebraska State Bar Association regarding prevailing attorney's fees in Nebraska, 2) a stipulation regarding attorney's fees in ***Dolejs v. City of Omaha***, 8:93cv00421, and 3) a September 4, 1990 newspaper article from the Omaha World-Herald regarding legal fees.

The Local Rules are quite clear with regard to the submission of supplementary evidentiary materials:

> The nonmoving party may, at the time of delivery and service of its opposing brief, *file with the clerk* such additional evidentiary materials as are being relied upon, and have not previously been filed, and shall serve a copy of them upon each other party.

NELR 7.1(b)(2) (*emphasis added*). The City of Omaha has failed to comply with the Local Rules and the court will not consider those items submitted with the City's brief.

In 1993, District Judge Richard G. Kopf found $160.00/hour to be a reasonable rate for Thomas F. Dowd's representation of a plaintiff against the City of Omaha in a one-day jury trial brought pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-634, *et seq.* In so doing, Judge Kopf analyzed the rate requested and the hours expended under the twelve (12) factors articulated in ***Johnson v. Georgia***

Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974). "[T]he Eighth Circuit has expressly approved the use of the ***Johnson*** approach to calculating attorneys [sic] fees in civil rights cases." ***Hinkle v. Christensen,*** 548 F. Supp. 630 (D.S.D. 1982), **quoting** ***Allen v. Amalgamated Transit Union,*** 554 F.2d 876, 884 (8th Cir.), **cert. denied,** 434 U.S. 891 (1977).

Considering the requested hourly rate in light of ***Johnson,*** the affidavits in support of the plaintiff's application for attorney's fees (Filing No. 43, Exhibits A, B, C and D), and the previous analysis of Thomas F. Dowd's hourly rate by Judge Kopf, the court finds $175/hour to be a reasonable hourly rate. The court further finds the hourly rates of $125/hour for Michael P. Dowd and $60.00/hour for Timothy S. Dowd to be reasonable for local attorneys of their experience.

2. Hours Expended

The defendant has made the general assertion that "the number of hours requested for reimbursement should be reduced [by] no less than one-half." Defendant's Brief at 7. However, other than generic warnings regarding non-legal work or the potential duplication of efforts by counsel, no attempt has been made to direct the court's attention to any particular expenditure of hours which is alleged to have been billed unreasonably.

After carefully reviewing the billing records of the plaintiff's attorneys, the court finds that there are several areas of documentation deficiency. The court has established guidelines "to assist counsel in presenting to the court information essential to a reasoned explanation of

the fee award." Fee Application Guidelines at 1. Those guidelines require that an attorney must "[i]dentify with particularity the work done." *Id.* Specifically,

> – if a conference, state who was present and why their presence was necessary, where the conference was held, that subjects were discussed, and how long it lasted
>
> – if research, state who did it, what subjects and issues were researched, whether the results were incorporated into a brief, motion, or pleading, and what was done with any resulting brief, motion, or pleading

Id.

Examples of incomplete entries in the billing records for the instant case are: 1) "legal research", 2) "conference with client", and 3) "research". Accordingly, for insufficient documentation the court will reduce the time requested by Thomas F. Dowd by 42.25 hours and the time of Timothy S. Dowd by 8.00 hours.

The court is also somewhat concerned about a duplication of efforts by Michael P. Dowd, the "second-chair" attorney for the plaintiff. "The addition of a second chair for trial invites careful scrutiny by the court for possible duplication of effort." *Hinkle*, 548 F. Supp. at 632, citing *Walker v. Wegner*, 535 F. Supp. 415, 418 (D.S.D. 1982). The plaintiff notes that the City of Omaha was represented at counsel table by two attorneys, Assistant City Attorney Sheri E. (Long) Cotton and Deputy-City Attorney Kent N. Whinnery, throughout the trial. The plaintiff further asserts that, "in order to present an effective case . . . and by the very nature of the case and the issues involved," it

was necessary for two attorneys to sit at the plaintiff's table at trial. Plaintiff's Brief at 2.

The court has no doubt that the time Michael P. Dowd spent preparing for and sitting in on the trial was helpful to the plaintiff. In fact, Michael P. Dowd acted as lead counsel for the plaintiff during the instruction conference on October 5, 1995. However, not all of the time spent by Michael P. Dowd at counsel table is appropriately billable to his client, or in this case, to the opposing party. Additionally, Michael P. Dowd's time spent at trial from October 2-5, 1995 is simply noted: "Trial preparation voir dire. (MPD)". Filing No. 43, Exhibit A. This documentation is not specific enough according to the court's Fee Application Guidelines. The court observed Michael P. Dowd's performance during the trial and finds that his assistance in locating exhibits was beneficial to the effective direct examination and cross-examination of witnesses; an award of 13.00 hours, as opposed to the 38.00 hours set forth on the billing record, is more appropriate for the circumstances.

Another area of concern to the court is the time billed both by Thomas F. Dowd and Michael P. Dowd for strategy conferences on August 8 and 14, 1995. Although having a second attorney present to "toss around ideas" is undoubtedly useful to the plaintiff's case, the court finds that the time spent in conference should appropriately be billed only by Thomas F. Dowd. Because of a duplication of efforts, the court will reduce the time requested by Michael P. Dowd from 44.50 hours to 14.00 hours and the 6.00 hours requested by Timothy S. Dowd on October 3, 1995 for a "Court Appearance" will be eliminated in their entirety. Therefore,

IT IS ORDERED:

1. The defendant's motion for an enlargement of time (Filing No. 47) is granted and the "Brief in Response to Plaintiff's Motion for Attorney Fees," submitted to the undersigned magistrate judge on May 31, 1996, is deemed considered.

2. The defendant's motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 46) is denied.

3. The plaintiff's application for attorney's fees (Filing No. 43) is granted as set forth herein.

4. The plaintiff is awarded reasonable attorney fees in the amount of $51,756.25.

5. The defendant, the City of Omaha, shall pay the above sum to the plaintiff **on or before August 8, 1996.**

DATED this 21st day of June, 1996.

BY THE COURT:

/s/ Thomas D. Thalken
THOMAS D. THALKEN
United States Magistrate Judge

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126 – EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126 – EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER I – EMPLOYMENT

§ 12111. Definitions

As used in this subchapter:

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES
SUBCHAPTER I - EMPLOYMENT

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

CODE OF FEDERAL REGULATIONS
TITLE 29 – LABOR
SUBTITLE B – REGULATIONS RELATING TO LABOR
CHAPTER XIV – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1630 – REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Current through October 14, 1997; 62 FR 53508

§ 1630.2 Definitions.

* * *

(g) Disability means, with respect to an individual –

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits –

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working –

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to

the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

* * *

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See § 1630.3 for exceptions to this definition).

* * *

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical

judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

CODE OF FEDERAL REGULATIONS
TITLE 29 – LABOR
SUBTITLE B – REGULATIONS RELATING TO LABOR
CHAPTER XIV – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1630 – REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Current through October 14, 1997; 62 FR 53508

§ 1630.10 Qualification standards, tests, and other selection criteria.

It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

CODE OF FEDERAL REGULATIONS
TITLE 29 – LABOR
SUBTITLE B – REGULATIONS RELATING TO LABOR
CHAPTER XIV – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1630 – REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Current through October 14, 1997; 62 FR 53508

* * *

(b) Charges of discriminatory application of selection criteria –

* * *

(2) Direct threat as a qualification standard. The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (See § 1630.2(r) defining direct threat.)

* * *

APPENDIX B

EEOC Title I Regulations and Interpretive Appendix

Interpretive Guidance
Section 1630.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform the same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. *See* Senate Report at 23; House Labor Report at 52. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if an individual is blind, *i.e.*, substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) the geographical area to which the individual has reasonable access;

(2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs. *See*

Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, *e.g.*, the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or

recognized occupational classifications that indicate the approximate number of jobs (*e.g.*, "few," "many," "most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

* * *

INTERPRETIVE GUIDANCE

Section 1630.2(1) Regarded as Substantially Limited in a Major Life Activity

If an individual cannot satisfy either the first part of the definition of "disability" or second "record of" part of the definition, he or she may be able to satisfy the third part of the definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) the individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) the individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.
Senate Report at 23; House Labor Report at 53; House Judiciary Report at 29.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

An individual satisfied the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of

customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. *See* Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30-31.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's

definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."480 U.S. at 284.

An individual rejected from a job because of the "myths, fears and sterotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liablilty, attendance, cost of accommodation and accessibility, works' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

* * *

INTERPRETIVE GUIDANCE

Section 1630.2(r) Direct Threat

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of himself/herself or others. Like any other qualification standard, such a standard must apply to all applicants or employees and not just to individuals with disabilities. If, however, an individual poses a direct threat as a result of a disability, the employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level. If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to hire an applicant or may discharge an employee who poses a direct threat.

An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, *i.e.*, high probability, of substantial harm; a speculative or remote risk is insufficient. *See* Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45.

Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis. The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the

disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630:

(1) the duration of the risk;

(2) the nature and severity of the potential harm;

(3) the likelihood that the potential harm will occur; and

(4) the imminence of the potential harm.

Such consideration must rely on objective, factual evidence – not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes – about the nature or effect of a particular disability, or of disability generally. *See* Senate Report at 27; House Labor Report at 56-57; House Judiciary Report at 45-46. *See also Strathie v. Department of Transportation*, 716 F.2nd 227 (3d Cir. 1983). Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm. For example, an employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for

a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk..

The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability. *See* Senate Report at 56; House Labor Report at 73-74; House Judiciary Report at 45. *See also Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985); *Bentivegna v. U.S. Department of Labor*, 694 F.2d 619 (9th Cir. 1982).

EEOC COMPLIANCE MANUAL SECTION 902
DEFINITION OF THE TERM "DISABILITY"

902.5 MITIGATING MEASURES

– The determination of whether a condition constitutes an impairment must be made without regard to mitigating measures. 29 C.F.R. pt. 1630 app. § 1630.2(h). The availability of reasonable accommodation or auxiliary aids such as hearing aids to alleviate the effects of a condition has no bearing on whether the condition is an impairment. It is the scope or perceived scope of the condition itself, not its origin or capacity for being corrected, that determines whether a particular condition is an impairment.

Further, the extent to which the impairment limits the individual's major life activities should be assessed without regard to the availability of mitigating measures. 29 C.F.R. pt. 1630 app. § 1630.2(j); see also Senate Report at 23; House Education and Labor Report at 52; House Judiciary Report at 28. Thus, an individual who has experienced a significant loss of hearing is substantially limited in his/her ability to hear, even if the use of a hearing aid would improve the individual's level of hearing. House Education and Labor Report at 52; see also House Judiciary Report at 28-29. Similarly, individuals with impairments (such as epilepsy or diabetes) that substantially limit major life activities are individuals with disabilities, even if medication controls the effects of the impairments. House Education and Labor Report at 52; see also House Judiciary Report at 28-29. Accordingly, an individual who received dialysis treatments for polycystic kidney disease had a substantially limiting impairment, even though the disease was adequately treated

through dialysis. *Gilbert v. Frank*, 949 F.2d 637, 641, 57 EPD ¶ 41,106 at 68,909, 2 AD Cas. (BNA) 60, 63 (2d Cir. 1991) ("We are inclined to view persons whose kidneys would cease to function without mechanical assistance, or whose kidneys do not function sufficiently to rid their bodies of waste matter without regular dialysis, as substantially limited in their ability to care for themselves.")

Example 1 – CP, who has schizophrenia, takes medication to control the disorder. With medication, CP can function well in his everyday life. Without medication, however, CP cannot care for himself. CP has an impairment, schizophrenia, that substantially limits his major life activities. Although CP can function well with medication, he cannot care for himself without medication.

Example 2 – CP has systemic lupus, which often results in acute anemia and arthritis-like symptoms. CP's physician has prescribed medication to control the effects of the disease. Without medication, CP is very lethargic, develops a skin rash, and experiences severe swelling and stiffness in her joints. With medication, CP experiences none of these symptoms. CP has a disability. Her impairment, when evaluated without regard to the effects of medication, substantially limits her major life activities.

Example 3 – CP's right leg was amputated below the knee. Using a prosthesis, he can walk for a long distance without discomfort. CP has an impairment that substantially limits his ability to walk, even though he can walk with the use of a prosthesis. CP is an individual with a disability.

Note, finally, that the mere use of a mitigating measure does not automatically indicate the presence of a disability. Some individuals may use medication, prosthetic devices, or auxiliary aids to alleviate impairments that are not substantially limiting. For example, an individual who uses a hearing aid to correct a slight hearing impairment may not have a disability under the first part of the definition of the term "disability." The individual's impairment may only mildly affect his/her hearing and may not substantially limit the individual's ability to hear.

U.S. Equal Employment Opportunity Commission
March 1995

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(2)

Supreme Court, U. S.
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No. 97-738

In The

Supreme Court of the United States

October Term, 1997

CITY OF OMAHA,

Petitioner,

v.

ROYCE DOANE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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10 PP

QUESTIONS PRESENTED FOR REVIEW

Petitioner attempts to invoke this Court's jurisdiction pursuant to Supreme Court Rule 10(a) upon the claim that a conflict exists between the Circuits on the following issues:

1) Whether mitigating factors or measures are to be considered in determining whether an individual has an impairment which limits a major life activity under the ADA; and

2) In the case of a law enforcement position, whether a plaintiff is required to show an ability to perform the duties of such position without endangering other persons as part of the burden in establishing an ability to perform the essential job functions. Pet. 6, 9.

Since these are the only issues upon which Petitioner claims the existence of a conflict between the Circuits, although such contentions are erroneous as discussed, *infra,* none of the other issues referenced in the Petition should be considered in view of the limited considerations governing Review on Certiorari.

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STATEMENT OF THE CASE

While denial of the Petition is required simply upon review of the cases cited by Petitioner which do not as claimed establish a conflict among the Circuits, Rule 15(2) of this Court instructs the Respondent to address any perceived misstatements of fact or law in the Petition which bear upon the issues which would properly be before the Court if Certiorari were granted. In view of that instruction, Respondent will address multiple misrepresentations of facts which Petitioner has set forth under three distinct headings on pages 3-5 of its Petition.

Initially, Petitioner argues that Respondent was not disabled within the purview of the ADA because he had not suffered an impairment that substantially interfered with the major life activity of seeing. In support thereof, it claims that the evidence of Respondent's medical experts was that his loss of sight in the left eye did not interfere with his ability to see as well as the general public. Pet. 3-4. The evidence is totally contrary to Petitioner's representation in this regard inasmuch as Respondent's medical experts testified that his blindness in one eye substantially limited his major life activity of seeing since he cannot sense depth in the same manner as persons with binocular vision and that his peripheral vision is limited due to his impairment. App. 7.

Petitioner's next contention that it had not perceived Respondent to be disabled within the purview of the ADA is totally at odds with the admission testimony of its hiring agent, Chief of Police Skinner. Pet. 4. Chief Skinner admitted that he rejected Respondent's employment application because he perceived that

Respondent's visual problems would be a significant limitation. App. 9.

Petitioner's last claim that Respondent was not qualified to perform the essential functions of law enforcement officer is premised upon the factual misstatement that Respondent did not present any evidence that he was qualified for the position of a police officer except his performance of some eleven years earlier. Pet. 5. Contrary to Petitioner's representation in this regard, Respondent testified as to meeting all of the specific qualifications for the job and the medical experts testified that he made the adjustments necessary to compensate for the loss of depth perception and peripheral vision by learning to work with environmental clues and the adjusting of his head position. App. 7, 10. Additionally, vocational rehabilitation expert Marchisio testified that Respondent could perform the essential functions of the job. App. 20.

Petitioner makes an additional gross misrepresentation of fact, claiming that Respondent presented no evidence that a non-disabled person was hired in his place. Pet. 5. Although such misrepresentation of fact is totally disconnected with any of the arguments advanced by Petitioner, a response is in order. Respondent was denied the opportunity to enter a police training class because of his disability or perceived disability. The available police positions were filled by the recruits who had successfully completed the class. By virtue of the City's policy of not hiring individuals with any disabilities or handicaps for police officer's positions, it was reasonable for the jury to infer that Petitioner hired a non-disabled person in place of Respondent. App. 3, 21, 26.

REASONS FOR DENYING THE WRIT

I. There is no conflict between the Circuits relative to the Eighth Circuit's holding that the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures.

Petitioner represents that the holdings of the Seventh and Fifth Circuits are in conflict with the Eighth Circuit's opinion that the determination of disability should be made without regard to considering the effects of mitigating measures. Pet. 6. Petitioner cites the holdings of *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1994); and *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1997) in support of its contention. Pet. 7. A reading of such decisions discloses otherwise. Here, the Eighth Circuit specifically approved the EEOC interpretive guideline set forth in 29 C.F.R. Pt. 1630, App. § 1630.2(j) "That the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." App. 6, 7, 72. The Seventh Circuit in *Roth* at 1454 adopted the identical EEOC guideline. In *Ellison*, the Fifth Circuit refused to consider the application of such EEOC guideline since the Plaintiff had not presented the issue in the District Court. *Id.* 191. Thus, contrary to the representations of Petitioner, there is no conflict among the Circuits on this issue.

Petitioner then misrepresents the Eighth Circuit's holding by suggesting that the Court used mitigating factors, including Respondent's internal subconscious

adjustments. Pet. 7. To the contrary, the Eighth Circuit specifically found that while Respondent's brain has mitigated the effects of his impairment, the Court's analysis of whether he was disabled, did not include consideration of mitigating measures. App. 8. The Eighth Circuit's observation that Respondent's internal subconscious adjustments of his brain has mitigated the effects of his vision impairment is not in conflict with any of the holdings of other Circuit Courts, federal regulations or interpretive guidelines of the EEOC as argued by Petitioner. Pet. 6. Petitioner cites no authority for such an unfounded argument.

On page 7 of the Petition, it is misrepresented that Respondent's experts testified that no major life activity was impaired. To the contrary, their testimony was " . . . that Doane's blindness in one eye substantially limits his major life activity of seeing". App. 7.

Petitioner includes under its argument of a conflict among the Circuits the disjointed irrelevant reference of being substantially limited in the major life activity of working. Pet. 8-9. As observed by the Eighth Circuit, the major life activity involved in this case was that of seeing, not working, and thus Petitioner's argument is inapposite in this case. App. 9.

II. The Eighth Circuit's opinion is not in conflict with the First Circuit on the issue of an individual being qualified to perform the essential functions of a job per the ADA.

The Petitioner claims that the Eighth Circuit did not require Respondent to prove that he could perform the

job of a police officer in a manner which would not endanger others in order to meet his burden of proving he was qualified and on the basis thereof claims a conflict exists with the First Circuit's opinion in *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997). Pet. 9-10. In *Amego*, the Court simply held that if the essential job function implicated the safety of others, a plaintiff must demonstrate that he or she could perform the function in a way that would not endanger others. The Court simply held that in order to be qualified to perform the essential functions of some jobs, a showing must be made that you will not endanger others. The Eighth Circuit holding is not in disagreement with such a principle of law. There is nothing in its opinion that directly or indirectly suggests otherwise.

Here, the Eight Circuit found that a reasonable jury could have concluded on the basis of the evidence that the Respondent could indeed perform the essential functions of the job of a police officer which obviously included doing the same in a manner which would not endanger himself or others. App. 10-11. Ironically, Petitioner makes this argument in the face of its contention throughout the litigation that Respondent did not have an impairment which substantially limited his major life activity of seeing because he learned to adapt and accommodate himself to his impairment. App. 7.

Finally, Petitioner claims that there is somehow a conflict between the Eighth Circuit's opinion and the First Circuit's decision in *Amego* regarding a person who is perceived as having an impairment that substantially limits a major life activity as being disabled within the meaning of the ADA. Petitioner's argument on Page 11 of

its Petition in this regard makes no sense nor does it make any reference concerning any conflicts among the Circuits in this regard. Here, the Eighth Circuit quite pointedly noted that even if Respondent's condition did not actually substantially limit his ability to see, the Court's conclusion would be the same since Petitioner perceived Respondent as having an impairment that substantially limited a major life activity per Chief Skinner's admission. App. 9. The Court's disallowance of the jury instruction challenged on Page 11 of the Petition related to a proposed instruction for the life activity of working which was not involved in this case and for that reason was properly rejected as noted by the Eighth Circuit. App. 9.

CONCLUSION

The Petition is frivolous, being a composite of misrepresentations of fact and law. It should be denied and appropriate relief as provided by Rule 42(2) of the Rules of the Supreme Court granted.

Respectfully submitted,

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY

The Petitioner Made No Misrepresentations of Fact

The Eighth Circuit found:

> "Doane's brain has mitigated the effects of his impairment, but our analysis of whether he is disabled does not include considerations of mitigating measures. His personal, subconscious adjustments to the impairment do not take him outside of the protective provisions of the ADA." **App. p. 8**

Contrary to sister circuits, the Eighth Circuit, includes as mitigating factors, subconscious internal adjustments the brain makes to compensate for an impairment; and, contrary to some sister circuits, excludes mitigating factors in assessing whether or not a person is protected by the ADA. As a result it makes no distinction between a disability determination of an impairment that affects a person's vision and the required ADA civil rights determination of an impairment that presents substantial barriers to a person's vision. Thus it destroys the civil rights intent of the Americans With Disabilities Act.

Respondent's opposing brief underscores the need for this Court's guidance in establishing a uniform interpretation of the Americans with Disabilities Act as civil rights legislation. Respondent, following the guidance of the Eighth Circuit, ignores the unanswered trial testimony of its own experts that addressed the civil rights barriers issue, indeed ignores the civil rights issue entirely. Instead, it makes unsupported allegations that the City has made material misrepresentations of fact that Doane's medical experts determined that his vision is not

impaired. Respondent's bare allegation, however, is a misrepresentation in itself requiring the Petitioner to offer to this Court excerpts of the uncontested trial testimony of Doane's experts reviewed by the appellate court.

Dr. Stanley Truhlsen identified Doane's impairment, as medically defined, and concluded that Doane's sight impairment did not prevent him from performing everyday activities. **App. pp. 1-8**

The medical records of Dr. Bares offered by Doane stated: "He appears to have adapted quite well to his status as a one eyed individual and appears to be able to drive and carry out most of his duties without compromise . . . "; "From a functional standpoint, he is not limited in any capacity;" "Again, from Mr. Doane's standpoint, he should be able to perform any task that people with vision in both eyes perform in an equal capacity . . . ;" "Is a jailer at City jail, married, Likes gold, collects antiques, repairs roofs"; " . . . Adapted quite well to his status as a one eyed individual etc. . . . "

Mr. Alfred Marchisio demonstrated that although Doane suffered an impairment to the body as a whole and to his vision, he has not suffered an impairment that substantially interferes with the major life activity of seeing within the purview of the Americans with Disabilities Act of 1990. **App. pp. 8-11**

In an effort to draw the Court's attention away from the gravity of the pivotal point of the mitigation issue, the Respondent, attempted to justify the Eighth's Circuits decision on a separate basis for ADA jurisdiction, "perceived disability." Respondent summarized, out of context, one sentence of the testimony of Omaha Police Chief

James Skinner. Chief Skinner explained in depth why his risk analysis eliminated Doane as a police officer because of his vision impairment and yet allowed him to hire him as a detention technician. **App. pp. 16-25**

The Respondent misrepresents the evidence of the hiring policy of the Police Chief. The Chief's testimony **App. pp. 16, 18, 19** clearly demonstrated that, not only have persons with disabilities been hired as police officers, but also, that as long as a person can perform the essential functions of the entry level police officer position for which he applies, a disability will not be a barrier.

Finally, the Respondent alleges that contrary to Petitioner's statement, Doane offered evidence that he could perform the job of police officer: that evidence being his testimony, and the testimony of Doane's expert, Mr. Marchisio.

The undisputed evidence was that both reemployment and initial hiring of a police officer required successful completion of an extensive testing process, which included a written examination, physical examination, psychological examination, medical examination and background examination.

Mr. Marchisio testified that he based his opinion on an interview with Doane that lasted about one and half hours on July 19, 1995, and documents provided by the Respondent.

Doane's testimony was based on his experience over 10 years prior to the date of trial. Evidence of past

performance is not competent on the issue of future performance in a safe manner. *EEOC v. Amego, Inc.* 110 F.3d 135 (1st Cir. 1997). Doane presented no competent evidence that he could pass the examinations, or safely perform the job of a police officer. **App. pp. 11-14**

THE CIRCUITS ARE SPLIT

Respondent asserts that the Petitioner's position that the Circuits are split is frivolous and seeks damages pursuant to Rule 42(2) of the Rules of the Supreme Court. We can offer no response better than the Sixth Circuit's analysis after its observation of the courts' division. **App. pp. 26-27**

CONCLUSION

Mr. Doane's trial testimony was that his vision impairment did not limits his ability to perform major life activites, including seeing. **App. pp. 14-16**

> Q. And have you foregone any of those endeavors based upon the fact that your sight has left you in the left eye?
>
> A. No.
>
> * * *
>
> Q. Anything that you don't do because of your vision limitation, sir?
>
> A. Not that I can think of.

If Mr. Doane sought relief pursuant to the Americans With Disabilities Act in the First, Seventh or Fifth Circuits, he would certainly be denied. Those circuits would indeed find, based on Doane's testimony alone, that his vision impairment did not rise to the level of a civil rights barrier. If he sought relief in the Eighth, Sixth or Eleventh Circuits, he most certainly would be successful. The different result turns on one single pivoting question, to wit: whether the Circuit includes the effects of mitigating measures in its analysis of whether a substantial limitation of an impairment exists. For the reasons stated in the Petition and in this Reply, we respectfully request that writ of certiorari be granted.

Respectfully submitted,

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Appendix

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Excerpts of the trial testimony of Doane's Medical Expert Dr. Stanley Truhlsen.

Q. Doctor, do you have an opinion based on reasonable medical probability as an ophthalmologist as to whether at all times material herein Royce Doane, based on the diagnosed condition of his left eye and the condition of his right eye, had a physical impairment that affected a major life activity of life?

A. Yes.

Q. And what is your opinion in that regard?

A. Well, my opinion is that he has a disability, a visual disability.

Q. And, Doctor, do you have an opinion as to whether that disability substantially limits a major activity of life such as seeing?

A. Yes.

Q. And what is your opinion in that regard?

A. My opinion, it does limit.

Q. And did you consult or review any source material in reaching that opinion?

A. Yes, I did.

Q. And what material is that, Doctor?

A. Well, I used the material that's been developed by the American Medical Association to determine that disability in cases of partial or complete loss of vision in one or both eyes.

* * *

Q. Doctor, the Americans with Disabilities Act has a further phrase or definition which must be dealt with and that's the term "physical impairment". And I'm going to ask you to assume that the law defines a physical impairment as a physiological disorder or condition affecting one or more of the following body systems: neurological, musculoskeletal, sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine. Do you have an opinion based on reasonable probability as an ophthalmologist at all times material herein as to whether Royce Doane, based on your examination of medical records, had a physical impairment within the meaning of that definition?

* * *

A. All right, he does, yes.

Q. And what is your opinion in that regard?

A. My opinion is he has a disability.

Q Would that be with respect to specifically a sense organ?

A. A visual disability.

Q. Doctor, the law finally provides some guidance in terms of what is meant by the term "substantially limits", and I'm going to ask you to assume the law's phraseology in this regard. The term "substantially limits" means that the individual is unable to perform a major life activity that the average person in the general population can perform or the individual is significantly

restricted as to the condition, manner, or duration under which he can perform a major life activity as compared to the manner in which the average person can perform it. Assuming that definition, Doctor, do you have an opinion based on reasonable medical probability as an ophthalmologist as to whether Royce Doane at all times material herein based on your examination of the medical records had a condition which substantially limited his ability to perform a major life function?

A. Yes.

Q. And what is your opinion in that regard?

A. Well, he has a disability.

Q. And would he have a disability and a limitation different than the average person in the general population?

A. Yes, but if you can't see with one eye, you have a disability.

Q. Now, Doctor, would you explain to the jury the effect of his being a one-eyed individual on his ability to see peripherally?

* * *

A. People who have one eye make an adjustment in their ability to orient space and perception so that they tend to compensate with that loss by altering eye position and altering head position and using clues and adjustments that a two-eyed person doesn't have to do.

Q. What are these clues?

A. Well, there are various clues that an individual subconsciously learns. When you're using one eye only, you have a perception of space. For instance, you can tell whether a human being is large and looming before you, is close, or whether he appears to be smaller, and therefore, more distant. That gives you a sense of depth. You can have a clue as to change in contours or distances that overlap. You can have a change in what we call parallax. that's the judgment by which you change the position of your eye or triangulation, you might say, to adjust from here to here such as a child having a baseball thrown to him. If he's only one-eyed, he can learn to adjust to catch that ball. So this comes as some amount of untaught but natural evolution in a patient. The apparent size of objects I mentioned, so these are clues of light, space, depth, size that people tend to learn; and they tend to learn about their peripheral vision in the sense of turning their head and adjusting to compensate for what they don't have.

Q. Doctor, has Royce Doane been required to make certain modifications because of his blindness to his left eye in order to function?

A. Yes.

* * *

Q. And based upon your examinations of Royce Doane and your knowledge of Royce Doane as a patient and your expertise as an ophthalmologist, has he been able to make the modifications to overcompensate for this loss of vision?

A. Insofar as I know of his activities, he has.

* * *

Q. Doctor, the term "substantially limited" in the Americans With Disabilities Act, as I indicated to you earlier, refers to a determination that the individual's unable to perform a major life activity that the average person in the general population can perform; do you recall that?

* * *

Q. Doctor, is he also limited in the manner and method by which he functions as compared to the general population?

A. Well, that depends on his ability to adapt, of course, and I – his adoption – his ability to utilize these things that I just mentioned allows him to do certain things, but he still has that underlying disability.

Q. Would he have to, for example, develop a tendency to turn his head almost subconsciously more so than a member of the average public to gain peripheral vision as a two-eyed individual?

A. Yes.

Q. Doctor, with respect to the condition that you've diagnosed and your treatment of the patient and the examination and the tests you performed, have you made a determination as to whether he has depth perception?

A. I think he has depth perception in the sense that I just described his using of clues and various parallactic things.

Q. In other words, if you throw a softball at him, he can –

A. Shoot a basket, catch a ball, drive a car.

Q. A football?

A. Football.

* * *

THE COURT: Cross-examination.

MS. LONG: Yes, sir.

* * *

Q. But isn't it – with respect to – let's just take near and far because that's what we're looking at with the depth perception, is judging near and far; is that correct?

A. Depth perception, uh-huh.

Q. Okay. Besides indicating that one object is larger than another, an object is smaller than another, how does that apply with depth perception?

A. Well, that is only one element of judgment of depth, and if you have – if you have a person standing here and another one down the hall, the size of those people indicates a different depth. So depth perception depends on so may different intrinsic functions of the brain and interpretation that none of these stand alone, of course, they all function together.

Q. Is it accurate to say that in order to have accurate depth perception, based on these clues, you would have to be familiar with the objects that you're reviewing, how they stood in relation to each other?

A. No, I don't think – familiarity helps certainly, but I don't know that it's a requirement.

* * *

Q. And what I'm saying, sir, is, as you're making this constant survey to compensate for loss of a degree of peripheral vision, as you make this survey, when you turn your head, you are losing peripheral vision on this side?

A. Yes, you'd have to.

Q. Okay. And if a person has diminished peripheral vision, no matter how they turn their head, they're always going to be losing peripheral vision either from the side that is affected or the side that is not affected?

A. They have – I guess we might say for that instant in time.

* * *

Q. All right sir. Now, you were speaking to the definition of disability and you were saying that a person has a sight impairment or physical impairment when that substantially limits the major activity of seeing. I think that's what you were saying. Now, have you ever discussed how Mr. Doane personally is limited in seeing? Did you ever discuss that with Mr. Doane?

A. With him?

Q. Yes, sir.

A. Well, I guess not so much discuss with him, implied, when he was working at his job, he had this problem and he would come in for follow-up and there was never any indication, anything that he told me that he was having a problem in carrying out what his duties were.

* * *

A. When I saw him originally – well, I saw him throughout those years, I was not aware that he was having a visual problem in maintaining his life-style, his daily activity.

Q. See, that's what I'm asking. Did Mr. Doane ever tell you while you were trying to diagnose him, did he ever tell you that he was having any problems doing anything that he's ever done?

A. I don't recall that he told me that he had problems.

Q. So your opinion that Mr. Doane is suffering from a physical impairment that substantially limits seeing is just based on that clinical determination that you read out of your book; isn't that correct?

A. My opinion based on what's in the book is anybody that's blind in one eye has some disability.

Q. But with respect to Mr. Doane, you haven't had any conversation with him on how that – how his ability not to see in one eye impacts his daily activities; have you?

A. No, not that I recall.

* * *

Excerpts of trial testimomy of Plaintiff's vocational rehabilitation specialist Alfred Marchisio

Mr. Alfred Marchisio demonstrated that although Doane suffered an impairment to the body as a whole and to his vision, he has not suffered an impairment that

substantially interferes with the major life activity of seeing within the purview of the Americans with Disabilities Act of 1990.

A. Yes.

Q. And in your opinion, given that opinion, is he disabled by definition under the terms of the American's With Disabilities Act?

A. He's disabled under the Americans With Disabilities Act because he does not have full vision in the left eye.

Q. The American's With Disabilities Act provises that there must be some substantial impairment in one of life's major activities; is that correct?

A. Yes.

Q. And which of Mr. Doane's major life activities is substantially impaired in your opinion?

A. The life activity that's impaired, once again, goes back to the fact that his vision is not normal compared to you and I.

Q. I understand that. What of life's major activities are substantially impaired as a manifestation of that vision problem?

A. I would say at this point his life activities – he has accommodated himself for his major life activities such as performing household chores, gauging depth perception as he would do a household chore like most of us do. Those things are not interfered with. He has made accommodations or adjustments over time.

Q. So do I understand your opinion to be that in your opinion, none of Mr. Doane's major life activities are substantially impaired as a consequence of his vision problem?

* * *

A. In my opinion, he was impaired initially and he's made adjustments subsequently.

Q. In 1995 in your opinion is Mr. Doane substantially impaired in any major life activity?

A. No, other than the fact that he has the visual defects.

Q. And that's the defect. Now, what major life activity is impaired by that defect?

A. At this point he tells me he's able to recreate and perform household chores and most things that all of us can do, so I've not been able to identify anything in that area.

Q. So the answer in short terms is none; is that correct, sir?

A. Yes.

Q. Mr. Marchisio, Mr. Whinnery asked you if Mr. Doane had a substantial impairment concerning a major life activity; do you recall that questioning?

A. Yes.

Q. Are you familiar with the provisions of the Americans with Disabilities Act that define major life acts as including the activity of seeing?

A. That's part of it, yes.

Q. Do you have an opinion as a vocational consultant as to whether or not the major life activity of seeing by Royce Doane has been substantially impaired?

A. Yes, I have an opinion.

Q. What is your opinion in that regard?

A. My opinion is, relying on Dr. Truhlsen and Dr. Bares and Dr. Crossman, that he is impaired.

Q. He is impaired?

A. Yes.

Excerpts from the the trial testimony of Plaintiff Royce Doane

Q. Mr. Doane, you had testified that you had been involved in motor vehicle pursuits during your career as a police officer. Did I hear that testimony correctly?

A. Yes.

Q. And did you indicate the frequency with which you were involved in motor vehicle pursuits?

A. No, I did not.

Q. How frequently was that back in your time frame, let's say from '80 to '84, the last third or half of your employment?

A. Pretty rare.

Q. Your deposition was taken, was it not, back on September 1 of 95', not too long ago?

A. Yes.

Q. And you were placed under oath?

A. Yes.

Q. And didn't you indicate in your deposition – and I'll be referencing page 43, line 23, were you engaged in pursuits from '80 to '84? Answer: None notable. We chased drunk cars down a few blocks, but I didn't chase misdemeanors. Do you recall that question and that answer, sir?

A. Yes.

Q. And when you say none notable, I take it you mean nothing beyond a two- or three-block pursuit, at least in the '80 to '84 time frame; is that right?

A. Nothing that would make an impression on your mind that you could recall later. Certain incidents leave greater impressions.

Q. Is a long-term pursuit – now, by long-term I'll say more than eight blocks, a mile – in an emergency situation a dangerous undertaking for an Omaha police officer?

A. Yes.

* * *

Q. Would you agree with this: That while you're driving, chasing somebody that doesn't want to stop at any given point in that pursuit, you have a wedge of vision that is 20 percent less than a two-eyed police officer?

A. Yes.

Q. Have you – and let's again use the frame of reference of the last third or so of your career, '80 to '84 – been involved in crowd situations where people were engaged in assaultive behavior towards you where you had to keep an awareness of activity that was on either side plus what was in front of you for your own safety and the safety of other officers?

A. I don't recall any.

Q. If that were part and parcel of the police officer's lot in life in 1995, would you be of the opinion that you would be able to be aware of a little bit less of that activity in your field of vision than an officer with sight in two eyes?

A. Possibly.

Q. If officers were to testify that they have been involved in situations like that where they just caught a flash of something out of their peripheral vision and were able to protect themselves against a brick or rock or club, is there anything in your practical experience that would say that's baloney, that testimony has to be made up?

A. Experience officers use their peripheral vision.

Q. Use it, sir?

A. Yes, they use it.

* * *

Q. Let me be more specific. Do you have any hobbies, sir?

A. Yes.

Q. What are those?

A. Golf, Fishing, tools.

Q. And how long have you had those hobbies, sir?

A. Oh, I've golfed since I was ten, fished since I was five, fixed things since I was six.

Q. I seem to recall reading that you played golf also.

A. Golfed since I was ten.

Q. And have you foregone any of those endeavors based upon the fact that your sight has left you in the left eye?

A. No.

Q. No?

A. No.

Q. Are there any social activities that you would like to engage in or indulge in but you don't because of the vision problem? Do you go to movies on occasion if you're included?

A. Yes.

Q. Watch television?

A. Yes.

Q. Read?

A. Yes.

Q. Anything that you don't do because of your vision limitation, sir?

A. Not that I can think of.

Q. And you had mentioned handyman as being one of your hobbies and maybe a slight vocation to hopefully make a dollar here and there doing that; is that right sir?

A. Yes.

Q. What type of handyman work do you do, sir?

A. I live in the middle of a trailer park with 400 families. Many of those families are single, elderly people; and I help them when they ask, mow the yard, fix a leaky faucet.

Q. Do you have any difficulty because of your vision – and my questions are being focused on a vision problem. Do you have any problems caring for yourself or attending to your own needs because of that problem, sir?

A. No.

Q. You had indicated that you have contests going with your wife as far as using the treadmill so I take it you don't have any problems walking –

A. No.

Q. – or ambulating or even running if you feel like it; is that right?

A. That's correct.

Q. Do you have any hearing problems you think adversely affect or impact your ability to engage in normal pursuits that you care to engage in?

A. No.

Q. Your speaking is obviously quite good, well above average; would you agree with that, sir?

A. Thank you.

Q. Do you have any learning problems or breathing problems, any problems other than your vision that –

A. No.

Q. – really impact on your ability to live life to its fullest?

A. No.

Excerpts of the trial testimony of Chief James Skinner

* * *

A. As chief of police, I have a role in the employment of anyone who's hired for the police department.

Q. Do you recall since the adoption of the ADA in 1990 as to whether the police division has employed a sworn police officer who has had a physical condition or handicap?

* * *

A. Mr. Dowd, to the best of my recollection in my five and a half years as police chief, I think I've hired about 200 police officers.

Q. All right.

A. I seem to have a vague, some recollection of very recently hiring a recruit applicant who had diabetes. Now, that's – now, we're talking people hired. They are cases over the years, this health problem and that health problem, that we did not hire the individual but – hiring that one that comes to mind is with diabetes.

Q. With the positions you've identified that Mr. Doane would have been able to have performed with his visual limitations, why was he not hired and given the opportunity to work in those positions?

A. Again, because of our position or our position that we had a limited number of positions that were available that we anticipated that those number of positions would only be reducing as we went forward in the civilianization process and that we had an obligation to look at those people who were already employees of the police department, but not to hire those individuals who already had those severe problems that would not initially qualify them for all aspects of police work.

Q. From your answer, then, so that we are really understanding each other, as I understand it, because of your desire to provide positions for already employed police officers who sustain a physical limitation or handicap, it was your policy as chief of police in the time frame at least from August of '92 through July of '93 not to employ as sworn police officer, an individual who, because of physical limitations, would have required some job modification?

A. No. that's not true. Because of this particular individual with this particular problem, there may have been a host of individuals with one health problem or another covered by the ADA and that a reasonable accommodation perhaps could be made for entry-level police officers. but the decision on this individual, because of the nature of the problem, was that an entry-level officer, which is what he would be considered and

would be, that it would not be an individual we would hire.

Q. Even though he could perform some of the positions that were available?

A. That's correct.

Q. With respect to some other individual that you may consider hiring that had defects or handicaps or physical conditions other than visual limitations, if you were to hire them and place them in a modified job, how would you be enhancing your ability to keep modified jobs available for current officers that experienced physical limitations and handicaps.

A. I wouldn't do that. I wouldn't hire someone that has to be placed in a modified position.

Q. Let me go back again because I think we're misunderstanding each other. It is your position, as the chief of police, within the period of August '92 through July of '93 that you would not employ an individual who had a physical condition or limitation or handicap which would require their placement in a modified job position with the Omaha Police Division?

A. I would not hire them. If they were already a member, I would make accommodations.

Q. If they weren't a member of the force, you wouldn't make accommodations?

* * *

A. I would not hire a person who would need an accommodation for a modified position. If there was some type of – if there was some type of – whether it be

treatment of – and I'm trying to span the whole gamut of physical conditions that one might encounter, if there was some type of treatment or device or what have you that a person could undergo or work with, live with, and be able to function fully as an entry-level police officer in a variety of situations, then I believe the federal law requires us to then not let that be the reason not to hire the person. But to hire someone knowing that they could not be utilized in the full entry-level capacity, that they would forever need a modified position, that I would not do.

Q. And that's basically why you decided not to hire Royce Doane and place him in a position that would require some modifications?

A. That's correct.

Q. The position of detention technician, do you know whether or not at one time that position was filled by police officers?

A. Yes.

Q. And can you tell me when was it filled by police officers before?

A. It was filled by police officers up until approximately 1982.

Q. And do you know why they changed that position from police officer to civilian?

A. Yes.

Q. Can you explain to the jury why they did that?

A. The police department believed that it was no longer necessary to request sworn officers in that capacity and that there would be considerable cost savings to the city by creating the position of detention technician, hiring people with those skills and allowing them to carry out that function and then transferring the sworn officers from the detention to street patrol.

Q. Now, the detention technician position, does that require a person to make an arrest?

A. No, it does not.

Q. Does it require – does it have instances of personal confrontation?

A. Yes it does.

Q. Does it – can you distinguish between the personal confrontation of a detention tech and the personal confrontation of a police officer?

A. Yes.

Q. Will you do so, please?

A. A detention technician encounters individuals who are already in custody and they have been searched by police officers when they were arrested on the street. They have been searched just prior to being in the jail area and they are searched again at the time of booking; so first of all, there is not a concern for weapons that there would the same level that there is on the street because the person has been or should have been searched three times. They're in a closed environment in which the only other individuals immediately accessible are other police officers or other detention technicians

and an extremely limited amount of prisoners that may be in the immediate area. So the situation of a detention technician encountering a confrontation is significantly different from a police officer encountering a confrontation in a street situation.

Q. Now, where is the detention area located?

A. The detention unit is located in the subbasement of the police headquarters building approximately two floors below ground.

Q. Are there police officers on any of these other floors during a 24-hour period of time?

A. Yes.

Q. Are the doors secured?

A. Yes, they are.

Q. What is your opinion of the risk to the personal safety of a detention tech in one of these confrontations as compared to a police officer?

A. Certainly a detention technician could be injured, but at the same time the risk would be substantially different from that of a police officer because of the uncertainties and the vast number of possibilities that an officer could encounter on the street versus a detention technician encountering in the detention area.

Q. Are there usually police officers in the detention area as well?

A. There frequently are police officers in the detention area.

Q. What is your distinction of the risk to fellow employees in the detention situation as opposed to fellow officers in a police confrontation situation?

A. There is no doubt that a detention technician does face risks. In fact, there have been people injured in the detention area. There's no question about it. At the same time, the risk is not the same as what an officer faces on the street because the dramatic reduction of the possibility of a weapon being brought into the jail area versus officers encountering weapons on the street, also the number of individuals that may come at him versus an officer on the street who may have people come at him from all directions.

Q. Is there a crowd situation at all in the detention area?

A. There's never been one in my 25 years of service.

Q. What is the danger interpretation of the distinction between the amount of risk to the public in a detention situation, confrontation, and the amount of safety to the public in a police confrontation situation?

A. The danger to the public in a confrontation in the detention area would be virtually nonexistent absent, perhaps, a tour of one or two or three members of the public in the detention area, their risk would be virtually zero. The same situation on the street, it's dramatically different because you have all kinds of possibilities for dealing with the public who are passing by whom may live in the area, who are working in the area, who may be nearby but not part of the actual confrontation. The risk

to them is quite great. Also the risk of them becoming involved in the incident substantial.

Q. Were you aware of Mr. Doane's sight limitations in 1992?

A. I know that he had some sight limitations. I did not know the exact extent of those limitations.

Q. Did you know he was blind in one eye?

A. I knew there were significant sight limitations. Again, I did not know the exact nature, but I knew that it was significant.

Q. Were you involved at all in his position for a detention tech and his application for the position of detention technician?

* * *

Q. Will you please identify the exhibit I have just handed to you? It's Exhibit 114, Defendant's Exhibit 114. Will you identify that exhibit?

A. Yes. This is a City of Omaha notice of personnel change form that's routinely used by the city. it's known as a P-19.

Q. And whose notice of personnel change is that?

A. Royce J. Doane.

Q. And what positions are affected?

A. It indicates that this individual is being transferred from the position of communication operator to the position of detention technician II.

Q. What year?

A. This document, the effective date is April 12, 1991.

Q. Were you the police chief in 1991?

A. Yes, I was.

Q. Does that document require your approval?

A. Yes, it does.

Q. Were you aware of Mr. Doane's sight impairment at that time?

A. Yes, I was.

Q. Did you consider Mr. Doane disabled?

A. No.

Q. Can you explain why?

A. Because I felt that he was capable of performing the position of which he was being appointed to, that of detention technician; and the sight limitations that he had, it would not prevent him from performing effectively in that position.

* * *

Q. Now, with respect to his quest to become a police officer, did you consider Mr. Doane to be qualified to be a police officer?

A. No.

Q. Why not?

A. Because of his sight limitations.

Q. And how did that impact on his qualification?

A. It would not make him eligible in mind to apply for the position of police officer.

* * *

Q. Now, when you made the recommendation not to hire Officer Doane, was that recommendation solely limited to the fact that he had no vision in his left eye?

A. Based upon my understanding that his eyesight was extremely limited in one eye, yes.

Q. Currently you consider that a significant limitation –

A. Yes.

Q. – and you regard it as such?

A. Yes, sir.

The Court in Gilday v. Mecosta, 124 F.3d 760 (6th Cir. 1997) observed at 762:

> 1. Whether the Court Should Take the Presence of Mitigating Measures into Account When Deciding Whether a Disability Exists.
>
> In holding that Gilday is not disabled, the district court focused exclusively on how the diabetes impacted on Gilday's life after he had been diagnosed with the condition and had controlled it with medication and proper rest and eating habits. See 920 F.Supp. at 795-96. Under this court's recent decision in McKay, the district court's holding that Gilday's diabetes, when properly treated and controlled, does not substantially impair his ability to work or any other major life activity is correct. See McKay, 110 F.3d at 373.
>
> The EEOC's interpretive guidelines, however, state that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. s 1630 App. 1630.2(j). See also id. s 1630.2(h). The first question that we must address, then, is whether, in determining whether a person is disabled under the ADA, a court should look at the situation when the impairment is controlled by medication or treatment or, as the EEOC suggests, the court should evaluate the impairment without regard to the availability of such mitigating measures. The courts are divided on the question. Compare Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir.1997); Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir.1996); Fallacaro v.

Richardson, 965 F.Supp. 87, 93- 94 (D.D.C.1997); Wilson v. Pennsylvania State Police Dep't, 964 F.Supp. 898, 907 (E.D.Pa.1997); Hendler v. Intelecom USA, Inc., 963 F.Supp. 200, 206 (E.D.N.Y.1997); Shiflett v. GE Fanuc Automation Corp., 960 F.Supp. 1022, 1029 (W.D.Va.1997); Sicard v. City of Sioux City, 950 F.Supp. 1420, 1438-39 (N.D.Iowa 1996) (all explicitly adopting EEOC interpretation over direct challenges), and Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir.1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1349, 137 L.Ed.2d 506 (1997); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir.1995); Thomas v. Davidson Academy, 846 F.Supp. 611, 617 (M.D.Tenn.1994) (all using EEOC interpretation without substantial analysis), with Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 & n. 3 (5th Cir.1996) (dicta suggesting disagreement with EEOC view); Schluter v. Industrial Coils, Inc., 928 F.Supp. 1437, 1445 (W.D.Wis.1996) ("If an insulin-dependent diabetic can control her condition with the use of insulin . . . she cannot argue that her life is substantially limited by her condition."); Murphy v. United Parcel Serv., Inc., 946 F.Supp. 872, 881 (D.Kan.1996) (rejecting EEOC view as contrary to statute [FN1]); Coghlan v. H.J. Heinz Co., 851 F.Supp. 808, 813-14 (N.D.Tex.1994) (same). As the majority of these courts have held, the EEOC's interpretation of the statute is the correct one.